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## RIGHT OF VENDOR OF CONDITIONAL SALE, NOT RECORDED, TO RECLAIM PROPERTY AS AGAINST VENDEE'S TRUSTEE IN BANKRUPTCY.

In many states statutes exist avoiding a conditional sale as against a subsequent purchaser, where the sale is accompanied by a change in possession unless a copy of the contract is filed for record. It recently became the duty of the United States Supreme Court to determine whether under the provisions of such a statute, a trustee in bankruptcy could claim property in the possession of the debtor transferred to the latter by the terms of an unrecorded conditional sale. The court held the trustee could not hold the property for the reason that he does not occupy the position of a subsequent purchaser and therefore did not come within the terms of the statute. Hewitt v. Berlin Machine Works, 24 Sup. Ct. Rep. 690. The court in the course of its opinion said:

"Section 70*a* of the bankruptcy law of July 1, 1898, ch. 541, 30 Stat. at L. 565, U. S. Comp. Stat. 1901, p. 3451, provides:

'The trustee of the estate of a bankrupt, upon his appointment and qualification, . . . shall . . . be vested by operation of law with the title of the bankrupt, as of the date he was adjudged a bankrupt, . . . to all . . . (5) property which prior to the filing of the petition, he could by any means have transferred or which might have been levied upon and sold under judicial process against him.'

The district court, Hazel, J., held that the reasonable construction of this provision was that the trustee was vested with the title which the bankrupt had to property situated as described, and not otherwise, and quoted from the opinion of the circuit court of appeals for the second circuit in the case of *Re* New York Economical Printing Co., 49 C. C. A. 133, 110 Fed. Rep. 514, upholding that view, as follows: 'The bankrupt act does not vest the trustee with any better right or title to the bankrupt's property than belong to the bankrupt or to his creditor at the time when the trustee's title accrues. The present act, likeall preceding bankrupt acts, contemplates that a lien good at that time as against the debtor and as against all of his creditors shall remain undisturbed. If it is one which has been obtained in contravention of some provision of the act, which is fraudulent as to creditors, or invalid as to creditors for want of record, it is 'invalid as to the trustee.' And the circuit court of appeals, adhering to that decision, held in this case that, inasmuch as, by the New York statute, a conditional sale such as that in question was void only as against subsequent purchasers or pledgees or mortgagees in good faith, the district court was right, and affirmed the judgement. 56 C. C. A. 383, 118 Fed. Rep. 1017.

We concur in this view, which is sustained by decisions under previous bankruptcy laws (Winsor v. McLellan, 2 Story, 492, Fed. Cas. No. 17,887; Donaldson v. Farwell, 93 U. S. 631, 23 L. Ed. 993; Yeatman v. New Orleans Sav. Inst., 95 U. S. 764, 24 L. Ed. 589), and is not shaken by a different result in cases arising in states by whose laws conditional sales are void as against creditors.

In our opinion, these machines were not, prior to the filing of the petition, property which, under the law of New York, might have been levied upon and sold under judicial process against the bankrupt; nor could she have transferred it within the intent and meaning of § 70*a*. See Low v. Welch, 139 Mass. 33, 29 N. E. Rep. 216. The company's title was good as against the trustee, who could not claim as a subsequent purchaser in good faith."

## NOTES OF IMPORTANT DECISIONS.

STATUTES—MUST THE LATER OF TWO AMENDMENTS TO AN ACT REFER TO THE PRIOR AMENDMENT.—Where a legislature attempts to amend an act that his been amended by a prior legislature, must they repeal, or, in any other manner refer to the prior act? To the great conflict of authority on this point, the Supreme Court of Illinois adds another discordant note. Village of Melrose Park v. Dunnebeck, 71 N. E. Rep. 431, by holding that no reference need be made by the later amendment to the prior amendment. We say a discordant note, for this decision apparently overrules a prior decision of the same court which would seem to have settled the law quite contrary to the views of the court in this case. We refer to the case of Louisville & Nashville R. R. v. East St. Louis, 13 Ill. 656, 25 N. E. Rep. 962.

In the case of Louisville and Nashville R. R. v. East St. Louis, *supra*, the court said: "The

amendment of 1889 is, however, invalid. It purports to be an amendment to section 19, etc., of an act entitled 'An act to provide for the improvement of cities and villages,' approved April 10, 1872, in force July 1, 1872. That section had been previously amended by the enactment of a distinct and complete section in 1887, Laws 1887, p. 107. This amendment operated as a repeal of the act of 1872. People v. Young, 38 Ill. 490. Therefore, when the amendment of 1889 was passed, section 19 of the act of 1872 was not in existence and was not the subject of amendment."

The appellant in the principal case contended that the case of Louiville & Nashville R. R. v. East St. Louis, was not only contrary to an earlier decision of the Illinois supreme court, but also to the general weight of authority and cited following cases: School Directors v. School Directors, 73 Ill. 249; Wilkinson v. Ketler, 59 Ala. 306; Commonwealth v. Kenneson, 143 Mass. 419, 9 N. E. Rep. 761; Statev. Warford, 84 Ala. 15, 3 So. Rep. 911; Blake v. Brackett, 47 Me. 28; Bassnett v. City of Jacksonville, 19 Fla. 664; Saunders v. Pensacola, 24 Fla. 226, 4 So. Rep. 801; Lane Carruther v. Madison County, 6 Mont. 482, 13 v. MissoulaCounty, 6 Mont. 473, 13 Pac. Rep. 136; Pac. Rep. 140; Griggs v. Guinn, 29 Abb. N. C. 144. 21 N. Y. Supp. 451; People v. King, 28 Cal. 265; Greer v. State, 22 Tex. 588.

The court, in the principal case, evidently disliking to assume the attitude of reversing a recent case which in turn had practically reversed a previous one, attempts to distinguish the two apparently contradictory authorities as follows: "The case of Louisville & Nashville Railroad Co. v. City of East St. Louis, *supra*, does not purport to overrule the case of School Directors v. School Directors, *supra*. In fact, the latter case is not mentioned therein; and, indeed, we do not think it should be held to have overruled the latter case, but should be regarded as an exception to the rule. The only states that we are able to find that have, without qualification, adopted the rule announced in the case of Louisville & Nashville Railroad Co. v. City of East St. Louis, *supra*, are Colorado, in Wall v. Garrison, 11 Colo. 517, 19 Pac. Rep. 469; Georgia, in Lampkin v. Pike, 115 Ga. 827, 42 S. E. Rep. 213, 90 Am. St. Rep. 153; and Indiana in a number of cases, begining with Draper v. Falley, 33 Ind. 465, down to Peele v. Ohio, etc., Oil Co., 158 Ind. 377, 63 N. E. Rep. 763, and in anumber of cases between those in that state; while our examination discloses that the contrary rule is announced by the federal court in Columbia Wire Co. v. Boyce, 104 Fed. Rep. 172, 44 C. C. A. 588, and in Alabama, California, Florida, Kansas, Massachusetts, New Jersey, Michigan, Texas, New York, Ohio, and Wisconsin; and there may be added to the cases cited by appellant, Harper v. State, 109 Ala. 28, 19 So. Rep. 857; Fletcher v. Prather, 102 Cal. 413, 36 Pac. Rep. 658; Reynolds v. Board of Education (Kan.), 72 Pac. Rep. 274; People v. Pritchard, 21 Mich. 236; State v. Brewster, 39 Ohio St. 653; White v. Inebriate's Home, 141 N. Y. 123, 35 N. E. Rep. 1092; and Golonbieski v. State, 101 Wis. 333, 77 N. W. Rep. 189—all of which seem to announce and support the rule that: Where the amendment is considered as a continuance of so much of the law as is left unchanged in form or substance, or as having taken the place of the original enactment, and as incorporated therein, for all purposes, including amendment, a subsequent statute purporting further to amend the original act is to be construed in accordance with the intent of the legislature as operating on the prior amendment, and effect will be given to it." 26 Am. & Eng. Ency. of Law (2d Ed.), 704.

## IS THE PRESUMPTION OF INNOCENCE IN CRIMINAL CASES TO BE WEIGHED AS EVIDENCE IN THE CASE.

The presumption of innocence is usually classified as a disputable presumption of law, and the question is, whether it is evidence in favor of a defendant in a criminal case which can be weighed by the jury in his favor. On this question the authorities are in conflict.

In the case of Black v. State,[1] defendant Black was accused of being principal in the second degree to the murder of one, Green Butler. His attorney had asked the judge to charge as follows: "1st. The accused must be presumed to be innocent until his guilt is established by legal evidence, and in case of a reasonable doubt as to his guilt, he is entitled to be acquitted." The judge did not give the charge asked, but charged as follows: "3d. If the jury are not satisfied from the evidence that Green Butler was shot and killed by Andrew J. Walker, and that the defendant, Jeff Black, was present at the time of the killing, aiding the said Walker by his acts or encouraging him by his words, they will find him not guilty." "4th. If the jury entertain a reasonable and well founded doubt of the defendant, arising out of the evidence of the case, they will find him not guilty." The jury found him guilty and on appeal it was insisted by the state that the charge as given enunciated the principle that defendant is presumed innocent until proved guilty, as effectually as if the exact language had been given. The court quoted article 3105, Criminal Code, which is as follows: "A defendant in a criminal cause is presumed to be innocent until his guilt is established by legal evi-

[1] 1 Tex. App. 368 (1879).

dence, and in case of reasonable doubt as to his guilt, he is entitled to be acquitted." The court then remarked: "It will be seen by reference to the first special instruction asked by the counsel for the defendant, in the court below, that it is in the exact language of said article 3105. It was the law, and, be it much or little, the defendant was entitled to all of it, and it should have been given; and especially in the case like the one at bar when the life of a fellow being was at stake, and when all the evidence against him was circumstantial." This ruling was adhered to in subsequent cases.[2]

In the case of Long v. State,[3] defendant was accused of assault with intent to kill. His attorney asked for the following instruction: "The defendant is presumed to be innocent until the contrary is shown, and where there is reasonable doubt whether his guilt is satisfactorily shown, he must be acquitted;" which instruction was refused on the ground that the same had been substantially given in the instructions of the court. The court said: "We have carefully examined all the instructions and find that the second branch of that asked and refused had been substantially given, but that they were silent as to the presumption of innocence. The court should have charged the jury on that subject as asked, and an error was committed by its refusal to do so."[4]

In the case of People v. Macard,[5] Macard was accused of the murder of O'Hara. The killing was admitted, but the claim was that it was done in self-defense. The court said: "The court should have charged the jury that the respondent was presumed to be innocent until proved guilty. It is claimed that the court charged that the jury must find that all the material facts were to be proved beyond a reasonable doubt, and that this should be held sufficient. There is a difference between innocence and doubtful innocence. Neither it is true will allow a conviction, but the assumption abides with the accused from the beginning, and is alone a sufficient defense until overthrown by proof." The court after remarking that persons accused of crime are regarded with suspicion by the average juror says: "It should have been given by the court, although no request therefor was made by counsel. It is the court's duty in every criminal case, to see to it that the prisoner has a fair trial."

In the case of People v. Graney, 91 Mich. 646 (1892), the defendant was convicted of a crime against nature. It was contended that the trial court erred in failing to instruct the jury that the defendant was presumed to be innocent until proven to be guilty.[6] The court said: "In the present case the respondent was represented by counsel, who presented requests to charge to the court. It does not appear that such counsel requested any such instruction or called the court's attention in any way to its omission so to charge the jury. The record does not show that the counsel for respondent was not fully competent to preserve the rights of his client, and the judge told the jury that it was not for the respondent to prove his innocence. He also said: 'This is a very grevious offense. It is easily charged and the negative of it is difficult to prove. The prosecution must satisfy you beyond a reasonable doubt of the defendant's guilt.' Also: 'The evidence should be plain and satisfactory in proportion as the crime is detestable.' And again: 'You must acquit the defendant unless you are satisfied that his guilt has been strictly and impartially proven —that it is true beyond a reasonable doubt.'

We think that in substance the jury were informed that the presumption of innocence was with the respondent until the jury found that he was proven guilty beyond a reasonable doubt. It must not be understood from the decisions above quoted that a judgment will be reversed in all cases where the jury are not informed in so many words that the presumption of innocence remains with the respondent until he is proven guilty." As the charge of the trial judge was to the effect that the burden of proof was on the state to prove the guilt of defendant beyond

[2] Coffee v. State, 5 Tex. App. 545; McMullen v. State, 5 Tex. App. 577.

[3] 46 Ind. 82 (1874).

[4] This case was affirmed in Line v. State, 51 Ind. 172 (1875), the judge quoting the remark of the judge in the preceding case. As remarked by the Texas court in Black v. State, *supra*, Indiana has a statute similar to the Texas statute quoted above. These statutes may have influenced the decision of the preceding cases.

[5] 73 Mich. 15 (1858).

[6] Citing People v. Murray, 72 Mich. 10; People v. Macard, 73 Mich. 25; People v. Potter, 89 Mich. 353.

a reasonable doubt, and he did not mention specifically the presumption of innocence, this case seems to hold that the presumption of innocence means no more than the burden of proof and the amount of evidence to make out a case. It may be noticed that the court was not asked to charge the presumption. [7]

The case of Harrington v. State, [8] is to the effect that the presumption of innocence which is raised by proof of good character varies in force with the circumstances, thus agreeing with Fire Association v. Bank, *infra*. But it also holds that it does not vary with the grade of the offense irrespective of the circumstances. The court seems to speak of the presumption as one of fact. [9]

In the case of Long v. State, [10] the trial judge gave the usual instruction that the prisoner was to be presumed innocent until the contrary was proved; but because he did not further instruct as asked, that "the legal presumption of innocence was a matter of evidence, to the benefit of which the plaintiff in error was entitled," it was held error the court saying: "This part of the instruction was evidently copied from the syllabus of the opinion written by the present Chief Justice in Garrison v. People, 6 Neb. 275. It should have been given." If this case is to be regarded as law it seems to be necessary to read the head notes as well as the opinion, and that a judge, after correctly instructing as to the presumption of innocence, must further tell the jury that the presumption is evidence; and by analogy it is not sufficient for the judge to admit testimony, he must also instruct that the testimony so admitted is evidence, on pain of reversal should he so refuse to so instruct.

The case of Coffin v. United States, [11] arose in the Circuit Court of the United States for Indiana and was a proceeding against officials of a national bank for wilfully misapplying funds of the bank and other related charges. The defendants were convicted. The exceptions were numerous, but all were overruled except two. The principal exception related the refusal of a trial judge to charge as he was asked on the subject of presumption of innocence. The charge asked and refused was: "The law presumes that persons charged with crime are innocent until they are proved by competent evidence to be guilty. To the benefit of this presumption the defendants are all entitled and this presumption stands as their sufficient protection unless it has been removed by evidence proving their guilt beyond a reasonable doubt." Although the trial court refused to give this charge, it yet instructed the jury as follows: "To justify you in returning a verdict of guilty, the evidence must be of such a character as to satisfy your judgment to the exclusion of every reasonable doubt. If therefore, you can reconcile the evidence with any reasonable hypothesis consistent with the defendant's innocence, it is your duty to do so, and in that case find the defendants not guilty. And if, after weighing all the proofs and looking only to the proofs, you impartially and honestly entertain the belief that the defendants may be innocent of the offensive charge against them, they are entitled to the benefit of that doubt and you should acquit them." The Supreme Court held (and there was no dissenting opinion) that there was error in refusing the charge desired on the presumption of innocence saying: "The principle that there is a presumption of innocence in favor of the accused is the undoubted law, axiomatic and elementary," etc. The court then goes on to give various citations to the effect that there is a presumption of innocence and that it is better that many guilty escape than that one innocent man suffer. The prosecution argued that as a charge actually given con-

[7] This case is followed in People v. Ostander, 110 Mich. 60.

[8] 19 Ohio St. 264.

[9] Morehead v. State, 34 Ohio, 212 (1877). In this case defendant was accused of murder. His counsel requested the court to charge: "That the defendant is in law, presumed to be innocent of the crime charged against him until every fact necessary to convict him is fully proved." In the form requested the court refused to give it. The court, however, in its general charge, having enumerated and explained the several elements of the crime charged, instructed the jury that: "The law requires, in a criminal case, that the state should prove the material elements of the crime beyond a reasonable doubt." The court then said: "The question, therefore, is whether having so charged, the court erred in refusing to give the instruction requested. Unquestionably the defendant was entitled to the benefit of the usual presumption of his innocence. We think however, that it was given to him. The benefit of the presumption of innocence was fully and practically secured to him in the instruction that the state must prove the material element of the crime beyond a reasonable doubt."

[10] 23 Neb. 33.

[11] 156 U. S. 432. Argued December 6, 1894, decided March 4, 1895.

tained the substance of the charge asked, there was no error. The court admitted that if such were the case, there was no error but denied that charging that "there cannot be a conviction unless the proof shows guilt beyond a reasonable doubt, so entirely embodies the statement of presumption of innocence as to justify the court in refusing, when requested, to inform the jury concerning the latter."[12]

In the case of Agnew v. United States,[13] the trial court instructed the jury as follows: "The defendant is presumed to be innocent of all the charges against him until he is proven guilty by the evidence submitted to you. This presumption remains with the defendant until such time in the progress of the case, that you are satisfied of the guilt beyond a reasonable doubt," and refused the following instruction asked by the defendant: "Every man is presumed to be innocent until he is proved guilty, and this legal presumption of innocence is to be regarded by the jury in this case as matter of evidence to the benefit of which the party is entitled. This presumption is to be treated by you as evidence giving rise to resulting proof to the full extent of their legal efficacy." The refusal to so instruct is assigned as error.

The court, after stating that the court was not bound to use the exact language of an instruction asked, if the substance is given, said: "The instruction given was quite correct and substantially covered the instruction refused, and as to the latter the court might well have declined to give it on the ground of the tendency of its closing sentence to mislead."

In the case of State v. Heinge,[14] defendant was tried and convicted of selling intoxicating liquors without a license, and contention was that court did not charge that prisoner was to be presumed innocent. The court said: "In this case the court did not declare in so many words, that the defendant was presumed innocent, and that it was incumbent upon the plaintiff to overthrow this presumption, yet, at the request of the defendant the jury were told: 'that it is required by the state to prove beyond a reasonable doubt that the defendant did sell liquor as charged and that he took money for the same, and that if the jury believed that the state did not prove the same they must find the defendant not guilty.' This was sufficient and the defend ant was not prejudiced by the failure to give an instruction on his presumed innocence. The appeal is without merit."

Prof. Thayer's Preliminary Treatise on Evidence,[15] after giving the authorities cited in Coffin v. United States, for the statement that the presumption of innocence is a piece of evidence, a part of the proof says: "This

[12] For and against this view the court cites Black v. State, 1 Tex. App. 368: Priesmuth v. State, 1 Tex. App. 480: Mullen v. State, 1 Tex. App. 577: Long v. State, 46 Ind. 489; Line v. State, 51 Ind. 172, in which cases the court thinks the result might have been influenced by statutes of Texas and Indiana; also People v. Potter, 89 Mich. 353; People v. Graney, 91 Mich. 646; People v. Macard, 73 Mich. 15: Morehead v. State, 34 Ohio, 212; An Article in Criminal Law Mag. 1889, vol. 11, p. 3; Ogletree v. State, 28 Ala. 693; Moorer v. State, 44 Ala. 15; People v. Lemon, 79 Cal. 625; Best on Presumptions; Stevens in History of Criminal Law, vol. 1, p. 437: "The confusion in the authorities," the court said, "makes it necessary to consider the distinction as between the presumption of innocence and reasonable doubt as if it were an original question. In order to determine whether the two are equivalents of each other, we must first ascertain with accuracy in what each consists. Now the presumption of innocence is a conclusion drawn by the law in favor of the citizen, by virtue whereof when brought to trial upon a criminal charge, he must be acquitted, unless he is proven to be guilty. In other words, this presumption is an instrument of proof created by the law in favor of one accused, whereby his innocence is established, until sufficient evidence is introduced to overcome the proof which the law has created. This presumption on the one hand, supplemented by other evidence he may have produced, and the evidence against him on the other, constitute the elements from which the legal conclusion of his guilt or innocence is to be drawn." "Concluding then," the court said, "that the presumption of innocence is evidence in behalf of the accused introduced by the law in his behalf, let us consider what is 'reasonable doubt.' It is of necessity the condition of mind produced by the proof resulting from the evidence in the cause. It is the result of the proof, not the proof itself; whereas the presumption of innocence is one of the instruments of proof going about to bring about the proof, from which reasonable doubt arises; thus, one is a cause, the other an effect. To say that the one is the equivalent of the other is therefore to say that legal evidence can be excluded from the jury, and that such exclusion may be cured by instructing them correctly in regard to the method by which they are required to reach their conclusion upon the proof actually before them. In other words that the exclusion of an important element of proof can be justified by correctly instructing as to the proof admitted."

[13] 165 U. S. 36 (1897).

[14] 66 Mo. App. 135.

[15] Appendix B, p. 575.

is the authority and it is slight indeed. And the opinion adds a strange unsupported assertion that the recognition of the presumption of innocence as a presumption of law (*presumptio juris*) demonstrates it to be evidence, and that in all systems of law legal presumptions of law are treated as evidence. It is easy to make such an assertion and to leave the matter there. But as one who has long and attentively studied the subject of presumptions, I can only say that I know of nothing to support it in any sense which tends to sustain the reasoning of the opinion. "What appears to be true may be stated thus: 1. A presumption operates to relieve the party in whose favor it works from going forward in argument or evidence. 2. It serves, therefore, the purposes of an *prima facie* case, and in that sense it is temporarily, the substitute or equivalent for evidence. 3. It serves this purpose until the adversary has gone forward with his evidence. How much evidence shall be required the adversary to meet the presumption, or as it is variously expressed, to overcome it or destroy it, is determined on no fixed rule. It may be merely enough to make it reasonable to require the other to answer; it may be enough to make out a full *prima facie* case and it may be a great weight of evidence, excluding all reasonable doubt. 4. A mere presumption involves no rule as to the weight of evidence necessary to meet it. When a presumption is called a strong one, like the presumption of legitimacy, it means that it is accompanied by another rule relating to the weight of evidence to be brought in against him by whom it operates. 5. A presumption itself contributes no evidence, and has no probative quality. It is sometimes said that the presumption will tip the scale when the evidence is balanced. But, in truth, nothing tips the scale but evidence, and a presumption—being a legal rule or a legal conclusion—is not evidence. It may represent and spring from certain evidential facts and these facts may be put in the scale. But that is not putting in the presumption itself. A presumption may be called "an instrument of proof," in the sense that it determines from whom evidence shall come, and it may be called something "in the nature of evidence," for the same reason, or it may be called a substitute for evidence, and even "evidence"—in the sense that it counts at the outset for evidence enough to make it a *prima facie* case. But the moment the conceptions give place to the perfectly distinct notion of evidence proper—*i. e.* probative matter, which may be a basis of inference, something capable of being weighed in the scales of reason and compared and estimated with other matter of a probative sort—so that we get to treating the presumption of innocence or any other presumption as being evidence in this its true sense, then we have wandered into the region of shadows and phantoms.[16] In Greenleaf on Evidence,[17] a contrary view is taken: "This legal presumption of innocence is to be regarded by the jury in every case as a *matter of evidence*, to the benefit of which the party is entitled."

The following are civil cases in which it was necessary to prove a criminal charge. In such actions by the weight of authority in American courts, it is only necessary to prove the charge by a preponderance of testimony. In other respects it would seem that the analogies of criminal law would hold.[18]

The case of Weston v. Gravlin,[19] was an action of trespass *quare clausum* for maliciously breaking windows, etc. Defendant asked a charge, that as he was charged substantially with the commission of a crime, plaintiff must overcome by a fair balance of testimony, not only the evidence introduced by the defendant, but also the legal presumption of innocence. The court declined to charge as requested, but charged that the jury were to determine upon a fair preponderance of the evidence, whether the defendant had anything to do with the alleged trespass; that the case was civil and that the rule of evidence in cases was to be followed: that as upon the whole evidence the matter seemed most likely to be, so was their verdict to be; and if upon

[16] See also to same effect: Taylor on Evidence (Chamberlayne's notes), pp. 69, 103, 104, 183.

[17] Sec. 34.

[18] Bradish v. Bliss, 35 Vt. 326. The syllabus is as follows: "If in a civil action a question arises, the determination of which involves the establishment of the fact that either party has been guilty of a criminal act, the other party, in order to obtain a determination of such question in his favor, must overcome by a fair balance of testimony, not only the evidence introduced by the party so charged, but also the legal presumption of innocence which exists in every such case."

[19] 49 Vt. 507.

the whole evidence the preponderance was in favor of his having participated in the breaking of the windows, then their verdict should be guilty. The court said: "This (the charge given) is the rule in civil cases and we do not understand that the rule is to be varied because the act complained of might subject the defendant to a criminal prosecution. The law presumes men innocent when charged with crime; and when charged in a civil case with acts that make them amenable criminally the same presumption exists, but this does not vary the measure of proof. If the plaintiff overcomes the defendant's evidence, he overcomes all that the rule requires. This presumption is of no force in such cases; or, in other words, it goes down with the defendant's case." This case certainly appears in conflict with preceding cases in Vermont and seems to hold that in civil cases at least the presumption of innocence is not strictly evidence, but merely regulates the burden of proof. The case of Fire Assn. v. Bank,[20] was a civil action of *assumpsit* in which it was necessary for the plaintiff to show that one Hopkins was guilty of a forgery. Defendant requested the court to charge, that inasmuch as it was necessary for plaintiff to prove that Hopkins had committed the crime of forgery, the presumption of law was against it, and that to recover the plaintiff must overcome not only the evidence of the defendant, but also the legal presumption of innocence as well, by a fair balance of evidence in the plaintiff's favor. The court charged as follows: "The rule is very much as stated by Judge Poland, that the presumption of innocense attaches, and is to be weighed in favor of the party who claims that the transaction is an innocent one. But that this is a legal presumption of innocence and is nothing more than this, that the jury are not to start out with the idea that the crime has been committed, and that this is a crime; but from all that is developed in the case they will say whether from the character that is developed of the person who is claimed to have committed the crime, just what there is to that legal presumption and how much weight they will give it. The legal presumption is to have just such weight as the jury think it ought to have in the given case, from what they learn about the party that is accused of the criminal transaction, his motives and character. This is what I understand by the legal presumption of innocence." The court said that the request was a proper one, and that the charge given substantially complied with the request, and correctly stated the general rule; that if the evidence showed that Hopkins had been guilty of other offenses, that he had been convicted in criminal prosecution of the forgery in question, that he had misappropriated money, these facts might be considered in overcoming the presumption of innocence. In so far as the presumption of innocence is evidence in favor of the defendant the court seems to treat it as one of fact, which varies according to circumstances. In this respect it differs from Hawes v. State, 88 Ala. 37, 72, where the court, speaking of presumption in a criminal case, said: "The presumption is single and the same in all cases, and in all must be overturned by evidence which excludes every other reasonable hypothesis than that of guilt." In the case of Currier v. Richardson,[21] defendant was accused of libel in saying plaintiff had been guilty of larceny. He attempted to justify. The court after charging the jury that burden of proof was on defendant to make out his justification by a fair balance of evidence, instructed as follows: "In addition to making out by a fair balance of proof his justification, he must also overcome the legal presumption of innocence," etc. The court said: "The jury were told that the defendant, in addition to making out by a fair balance of proof his justification, must also overcome this legal presumption of innocence. By this instruction the jury may have understood that something more than a fair balance of proof was required, and that after the defendant had established the charge of theft by a fair balance of the proof, which included the presumption of innocence and all facts and circumstances which tended to disprove the charge of theft, he must go further and again overcome this presumption of innocence. Included in, and to be weighed as part of the plaintiff's evidence, was the natural presumption of innocence, all of which taken together was to be overcome by a fair balance of proof. We think that the jury may have understood that more than this was required, and that

[20] 54 Vt. 635.

[21] 63 Vt. 617.

in this respect there was error." It should be noted that it was the natural presumption of innocence which was to be weighed as part of the plaintiff's evidence. In the case of Childs v. Merrell,[22] defendant was sued for deceit. He requested the court to charge that "the legal presumption is that the defendant is not guilty, and he is entitled to have this presumption weighed in his favor." The court said: "The rule is now generally recognized that the jury should be told that the presumption exists. The plaintiff does not contend this is not the law, but insists that the jury were so instructed. A majority of the court were of opinion that the request was not complied with. The jury were told that the case must be disposed of 'upon consideration of all the facts and circumstances of the case appearing in evidence' thus excluding any presumption of innocence." The court does not state whether the presumption of innocence which the jury were excluded from considering was the natural presumption as in previous case or the presumption of law, and if the latter in just what way a rule of law can be 'weighed.'

*Conclusion.*—It will be seen from an examination of the foregoing authorities that a considerable difference of opinion exists as to the nature of the presumption of innocence, and whether it can be considered "evidence" in favor of the defendant which can be "weighed" by the jury. Prior to the case of Coffin v. United States, courts had reached diverse conclusions, without apparently making any examination of the question or giving reasons for their judgments. That case purports to have considered the question carefully *de novo*. The doctrine there announced has since been vigorously denied by Prof. Thayer and other text writers.

It is difficult to say where the weight of authority lies. Perhaps more adjudicated cases have decided in favor of the affirmative of the question, though in some of these the decision may have been influenced by statute. The majority of text writers seem to take the negative view. The earliest books and cases which have come under my notice appear to say little or nothing about the presumption of innocence.

In view of the wide diversity of opinion my own conclusion is of little value. Most men are innocent of crime, and from this general truth, the jury as reasonable men, will infer or presume that it is more probable than not, that the particular man before them accused of crime is innocent. This is a natural presumption and may be "weighed" in favor of the prisoner even without a formal charge. But in so far as the presumption is one of law, it simply means, that the burden of proof is on the one asserting crime to prove it. The defendant is *prima facie* innocent, and if no evidence is brought against him, he is entitled to be acquitted. The presumption itself does not tell the amount of evidence necessary to overcome it. In criminal cases it is accompanied by another rule, which is that the proof against the prisoner must exclude every reasonable doubt, and in civil cases that the crime must be established by a preponderance of testimony. In each case the natural presumption of innocence may be considered as among the defendant's evidence. But I confess myself unable to see how a presumption of law which is a mere legal rule can be "weighed" how it can convince the understanding and make a man believe what he might otherwise disbelieve.

If the presumption of law is not an arbitrary one, devoid of probative force, why is it stronger in criminal cases than in civil cases? Why is the innocence of a party presumed rather than the innocence of a third person? Why should the presumption be stronger "evidence" in the one case than in the other? Is the understanding convinced in the one case more than in the other?

I do not wish to be understood as saying, that the presumption of innocence should not be charged, even though the jury is correctly instructed as to the burden of proof and reasonable doubt, and though logically it adds nothing. It may tend to disabuse the jury of any prejudice against the prisoner on account of the position in which he stands, even though an instruction that the burden of proof is on the state to prove every allegation against the prisoner would be substantially the same.

ROBERT A. EDGAR.

[22] 66 Vt. 302.

## WILLS—RIGHTS OF BENEFICIARY OF TESTAMENTARY TRUST UNDER INTESTATE LAWS.

### PEUGNET v. BERTHOLD.

*Supreme Court of Missouri, June 20, 1904.*

A testator gave half of his estate to his only child. The other half he gave to a trustee for the use of the child, empowering the trustee to manage the same during the life of the child, declaring that only the income thereof should be paid to the child, and conferring on the child power to dispose of the trust property at his death by will or otherwise. Held, that as the child acquired the remainder of the trust property in fee, under the law of descent, as undisposed of property, he was entitled to the same freed from the restrictions of the trust.

VALLIANT, J.: This is a suit in equity to discharge a trust created by the will of plaintiff's father, relating to property devised to a trustee for plaintiff's use. Armand Peugnet, the plaintiff's father, a resident of St. Louis and New York, died in 1894, leaving a will, which has been duly probated. The estate has, under the will, been fully administered, and final settlement and distribution made in the probate court in 1897. The only thing remaining to be done, according to the plaintiff's petition, is to turn over to him his share of the property that came to him under the third clause of the will, and by inheritance as the sole heir of his father. The testator left surviving him his widow, Virginia S. Peugnet, and the plaintiff, his only child.

The will contained the following clauses which are all of it that bear on this case.

"Second, I recognize that I have but one child, a son named Maurice B. Peugnet, and to that said child I give and bequeath one-half of my entire estate, real, personal or mixed and of every kind and to hold in such manner as he deems best.

"Third. The remaining one-half of said estate I give and bequeath to John B. Sarpy Berthold, as trustee without bond, for my son Maurice and for the sole use and benefit of said son and at death of said son this trust shall cease.

"Fourth. The said trustee shall have full power to buy, to sell, mortgage, invest, improve and manage, all of the said one-half interest or proceeds thereof held in trust during the life of said Maurice B. Peugnet as said trustee.

"Fifth. It being my intention that only the income derived from said one-half interest held in trust be paid over to my son Maurice, by said trustee as said trustee may think proper.

"Sixth. My said son Maurice is to have the power to dispose of at his death, by will or otherwise, of the entire one-half interest held by said trustee or his successors.

"Seventh. In the event of the death or disability of said trustee I direct that a successor shall be appointed by the Circuit Court of the City of St. Louis, in accordance with the statutes in such cases provided."

The testator's widow has conveyed to the plaintiff, her son, all her interest in the property in St. Louis in question. The trustee, the widow, and the plaintiff's children, all of whom are minors, are the defendants. The prayer of the petition is that the plaintiff be allowed to release the power, and that the trust be discharged.

The answer of the widow admits the truth of all the statements in the petition, and disclaims all right to the property named, except her dower right to the New York property, which the plaintiff does not question. The answer of the trustee admits the truth of all the statements in the petition. The children answer their guardian *ad litem* that they are too young to be advised of their rights in the premises, and pray the court to protect their interests.

At the hearing the foregoing facts were proven by the plaintiff. The defendants introduced no evidence. The court rendered judgment for the defendants, dismissing the plaintiff's bill. The plaintiff appeals.

This court has often said that in construing a will, and adjudging the rights of parties growing out of it, the intention of the testator, as derived from the will itself, must govern. So our statute declares, and so we would have to declare, in obedience to the common law, if there were no statute on the subject. So unqualified is this rule of construction that we are unwilling to say that it yields to any exception. But we make no exception to the rule when we say that the testator's intention appearing on the face of the will cannot be carried out if it is contrary to law—for example, if the will gives an estate in fee to a devisee, but imposes the condition that it shall never be subject to execution for his debts, or if it attempts to limit an estate in violation of the rule against perpetuities. Though we may gather from the face of the will that the testator had a certain purpose in view, yet, unless he has expressed that purpose in terms that the court can enforce without violation of established principles of law, the testator's intention cannot be carried out. Harbison v. Swan, 58 Mo. 147.

The testator devised this property to the trustee for the sole use of his son for life, and declared that at his son's death the trust should cease. The trustee was empowered "to buy, sell, mortgage, invest, improve and manage" the property, and was to give only the income to the testator's son. Thus having carved out a particular interest in the estate for the benefit of his son, limited in duration to the life of the son, and having given the son the power at his death to dispose of the property "by will or otherwise," the testator leaves the fee, in default of execution of the power, to go as the statute of descents directs. The consequence was that on the death of the testator the plaintiff, his only heir, took by inheritance the remainder in fee, and that estate is now vested in him, subject (i it is a subjection) only to the power of disposal given him by the will. If, therefore, we should

be satisfied that the testator's real intention was that his son was to have no other interest in the property devised to the trustee, except the income of it for life, and the power to dispose of it at his death, we could not give effect to that intention, because the testator omitted to say in his will what should become of the remainder in fee in the event there should be no execution of the power. The law supplies that omission, and casts the descent immediately on the heir. If the testator had said in so many words, "I give my son this land for and during the period of his natural life, and I will that he shall have no further interest in it," still, if he made no disposition of the fee, the son, his only heir, would take it by descent, in spite of what wsa said in the will.

The learned triai judge was of the opinion that the power of disposition given by the will interposed between the life estate and the remainder in fee, and so qualified the fee that the heir took it subject to the power, and that the plaintiff, as donee of the power, could not exercise it to increase his own estate. Atkinson v. Dowling, 33 S. Car. 414, 12 S. E. Rep. 93, is referred to as authority for that proposition. We do not understand the opinion of the Supreme Court of South Carolina in that case as announcing that doctrine, but, even if it does, it applies to the facts of that case and not to the facts of this case. There the donee of the power had only a life estate. Here the plaintiff has the life estate by will, and the fee by inheritance. What larger estate can he have? The will gives him the power to dispose of the fee only at his death, but by right of inheritance it is his to dispose of now. The idea, however, is that this power so dominates the fee that, if the plaintiff should convey it now by deed, the grantee would take it subject to the disposition the plaintiff, as donee of the power, might make of it by will. This brings us to the consideration of the question, what is the legal effect of the power, when held by the owner of the fee? Kent says: "It has also been a question of much discussion, and of some alterations of opinion, whether a power was not merged or absorbed in the fee, in case of an estate limited to such uses as A should appoint, and, in default of appointment, to himself in fee." The learned commentator then says that, according to good sense and reason, the power would merge, but he adds: "But the weight of authority is decidedly in favor of the conclusion that the power is not extinguished, and may well subsist with and qualify the fee." 4 Kent (8th Ed.), p. 367. Notes to the text refer to Sugden on powers, where the rule is so stated. We do not understand the authorities referred to as going farther than to say that the power is not merged in the fee in case where by the same instrument which gives the power it is provided that, in case the donee fail to exercise it, the fee shall go to himself. In such case the fee comes with the power, and is a consequence of its non-execution. That is not the case at bar. Here the plaintiff does not derive the fee by the will along with the power, and subject to it, but it takes it independent of the will, and independent of the power. It is what the law writers call a collateral or gross power, and is aimed to affect, not the estate given the donee in the will, but the estate that is not given him. If the fee had also been disposed of by the will to another person, then it would be subject to the power; and according to the English rule in which the great American commentator above quoted says he can see no good sense and he went deeper into the subject than the facts of this case require us to go), even if the will had given the fee to the plaintiff in default of execution of the power, the fee wonld still be subject to the power. When a testator devises an estate, he may by the same will qualify it by a collateral power, but he cannot so qualify an estate which he does not himself create. The fee in this property was in the testator, and subject to his deed while he lived, and to his will at his death; but after his death he not having disposed of it by deed or will, the law took hold of it, and gave it to the plaintiff without condition or qualification, other than the demands of administration. The property affected by this trust is now subject to be sold by the plaintiff, or to be sold by the sheriff on execution on a judgment against him, if there were such a judgment. He could not under the power given him in the will of his father, by his own will at his death, defeat a deed he might now make, or that the sheriff might make for him. It is contrary to the spirit of our law to hinder a person *sui juris* in the management of property that is altogether his own. Dado v. Maguire, 71 Mo. App. 642; Underhill onr Tust. (Am. Ed.), p. 370. art. 57, and notes; Sears v. Choate, 146 Mass. 395, 15 N. E. Rep. 786, 4 Am. St. Rep. 320; Grosvenor v. Bowen, 15 R. I. 549, 10 Atl. Rep. 589.

The judgment is reversed, and the cause remanded to the circuit court, with directions to enter a decree in conformity with the prayer of the petition. All concur.

NOTE. — *Merger of Equitable and Legal Estates.*— No subject of the law is left in more uncertainty by the decided cases than the question of the merger of equitable into legal estates.

Under the rule against perpetuities every trust estate created, except a charitable trust, may be separated into at least three essential subdivisions: first, the legal estate in the trustee for a certain definite period; second, the equitable estate in the *cestui que trust;* and third, the reversion in fee, which, of course, under modern statutes and decisions in this country, cannot be entailed, curtailed or in any other manner restricted either as to its duration or its alienation. The creator of every trust must see to it that he has provided for each of these three essentials; otherwise the law will do it for him. Thus, if in attempting to create a certain trust, he appoints a trustee, and names the one in whom the reversion shall rest, but fails to select the *cestui que trust* or is indefinite in describing who shall be the beneficiaries

of his bounty, the trust fails and the beneficial interest is at once given, under operation of law to the one holding the reversion. Thus, to suppose a case where the trust would not necessarily fall under such circumstances, let a trust be created for a person imperfectly or indefinitely described during the life of A, a stranger, with reversion in B, the trustee, C, is authorized to hold the estate during the life of A. Thus, while the legal estate for a term and the legal estate in fee have been properly identified, the beneficial interest has been left unprovided for. The law gives it to the reversioner, who thus holds the legal estate in fee, and the equitable estate for the term created by the trust. Again, the creator of a trust may name both the *cestui que trust* and the reversioner, but fail in naming a trustee, to hold the legal estate during the term of the trust's duration. It is a well-known rule of law that equity will not allow a trust to fail by reason of the non-existence of a trustee, and will therefore itself undertake to name the trustee. Still again, as in the principal case, the grantor may designate clearly the trustee and *cestui que trust*, and fail to provide for a reversioner. Here again the law, acting by virtue of the statute of descents and distributions, throws the title in fee to the proper heir, and thus provides a place for the reversion.

Now the question before us is as to the effect of the vesting of any two of these estates in the same person. Perry on Trusts states the rule generally as follows: "Where the legal and equitable estate in the same land becomes vested in the same person, the equitable will merge in the legal estate; for a man cannot be a trustee for himself, nor hold the fee, which embraces the whole estate, and at the same time hold the several parts separated from the whole." Perry on Trusts (5th Ed.), § 347, citing numerous authorities. It will be observed that the author has included in this general statement two of the three possible mergers, *i. e.*, the merger of the beneficiary's equitable estate with the legal estate of the trustee or with the legal estate of the reversioner. He has not included the other possible merger, the union of the two legal estates,—that of the trustee and that of the reversioner. This last possible merger, being that of two legal estates, does not interest us in our discussion at this time.

A glance at the decided cases is interesting. Thus, where a trustee of a parcel of land for the use of his children devised to his children all the residue of his estate, it was held that the legal estate in such parcel was vested in the children, the *cestuis que trustent*, either under the residuary devise, or by descent, and that their equitable estate was merged therein. Cooper v. Cooper, 5 N. J. Eq. (1 Halst. Ch.) 9. The case is an example of a union of the beneficiary's equitable estate with the legal estate of the reversioner. Still another instance of this sort of merger is illustrated by the case of Warner v. Sprigg, 62 Md. 14. In this case the holder of a fee conveyed to a trustee to hold the estate in trust for his (the grantor's) life with power in the grantor to dispose of the estate at his death. The court held that the *cestui que trust* could by deed dispose of the entire property conveyed in trust, since the equitable life estate and the legal reversion merged in time. So also where A conveyed his property to trustees for the benefit of his creditors, B and C, with the reversion in himself, and afterward transferred all his right, title and interest in his reversion to B and C, the trustees had no more control over the property, nor any authority to sell same under the terms of the trust agreement, and a bill for partition could be brought by B against C for a proper division of the estate. Selden v. Vermilya, 3 N. Y. (3 Comst.) 525.

Now let us take a case of the merger of the beneficiary's equitable estate with the legal estate of the trustee. Thus, it has been held that where the trustee is also one of the beneficiaries of the trust, he takes a legal estate to the extent of his interest in the beneficial estate. Mason v. Mason's Executors (N. Y.), 2 Sandf. Ch. 432; Bolles v. State Trust Co., 27 N. J. Eq. (12 C. E. Green) 308; Butler v. Godley, 12 N. Car. 94; Peacock v. Stott, 101 N. Car. 149, 7 S. E. Rep. 885.

The intention of the testator seems to be considered of paramount importance in certain cases. Thus, where a testamentary trust was for the benefit *inter alia* of the widow during her life, and imposed active duties upon the trustee in managing the estate, the death of a remainderman, whose heir the widow was, did not operate to merge the trust estate in the legal estate acquired by her as heir. Asche v. Asche, 113 N. Y. 232, 21 N. E. Rep. 70. See also Woodruff v. Woodruff, 44 N. J. Eq. 79, 16 Atl. Rep. 4. Another case in New York goes very far in extending the doctrine as to the importance of effecting the intention of the grantor or testator. Greer v. Chester, 62 Hun, 329, affirmed without argument in 131 N. Y. 629. In this case A devised her estate to trustees with directions to pay the income to her grandson for life and the remainder in fee to certain charities. The charitable devise in reversion was declared void, and the estate in fee vested under the statute of descents in the grandson. The court held, however, that there was no merger. The court said: "Assuming that as to the one-half of the estate after the trust life estate for the husband, and as to the other half after the trust life estates of the grandson, the testatrix was intestate, and the grandson would take this undisposed of property as heir-at-law and next of kin. I see no reason why this inheritance and succession should affect the valid trust estate for his life. Suppose, as might be the case, that he were not the only next of kin and heir-at-law, would not the trust for his life remain undisturbed notwithstanding the failure of these other provisions?" We feel it incumbent upon us to express our disapproval of the court's argument in this case and to record our inability to see the justice or logic of the exception to the rule in general. If the policy of the law is opposed to all restrictions upon alienation, it must certainly result that where the beneficial estate for life and the legal estate in fee unite in the same person, the latter possesses the entire estate, and should control its alienation without restriction. To permit an estate of that description to be tied up in the hands of one upon whom the law has cast its unqualified ownership is directly opposed to the policy of the law. The argument of the court at the close of our quotation, betrays a very superficial consideration of the question involved. The fact that there may have been others beside the *cestui que trust* to whom the reversion might have descended cannot affect the question in the least, as the courts have decided that there is a merger to the extent of the legal estate in fee which comes to the one holding the beneficial estate. Thus, suppose a testator devised his entire estate to trustees for the use of A for life and reversion to A, B and C. In such a case there is a merger of the legal and equitable estate as to one-third of the property in A, and a continuation of the trust estate in A for the remaining two-thirds with the reversion in B and C.

## JETSAM AND FLOTSAM.

### A SURFACE OWNER'S RIGHT OF SUPPORT—ENGLISH CASES.

In cases where the proprietary interests in the surface of lands and the subjacent minerals have become separated, one of the most important questions which arises in practice is whether the mineral owner is entitled in the course of his working to cause a subsidence of the surface, either with or without payment of compensation, as the case may be. The principle is now perfectly well established that the surface owner has a *prima facie* right of support for the land with the buildings on it at the time of separation, and though this is a right of which he may be deprived by the documents which constitute his title, yet it is for the mineral owner to show that the documents clearly have such an effect. But this result has not been arrived at without a great deal of litigation, which may be said to extend for practical purposes from the decision of the Queen's Bench in Harris v. Ryding, 5 M. & W. 60, to that of the House of Lords in New Sharleston Collieries Co. v. Earl of Westmoreland, 82 L. T. 725.

The separation of the interests in the surface and the minerals occurs, as a rule, in the following three cases: (1) where the landowner makes a grant of land with a reservation or exception of the minerals; (2) where upon the inclosure of waste lands of a manor the minerals are left in the lord of the manor and the surface is allotted to the tenants; and (3) where the landowner makes a grant of the minerals without the surface, the most usual instance of this being the grant of a mining lease. But in whichever of these modes the separation arose the surface owner has the same *prima facie* right to support. In Harris v. Ryding, *supra*, a conveyance of land was made with an exception and reservation to the grantor of mines and minerals, and of liberty to enter and dig and carry away, and to sink shafts, making a fair compensation for damage to be done to the surface, and the pasture and crops growing thereon. It was held that the grantor was entitled under the reservation only to so much of the minerals as was consistent with the enjoyment of the surface. Hence he was bound so to work the minerals as not to interfere with the support of the surface. The circumstances and the result were similar in Smart v. Morton, 5 E. & B. 30, save that the provision for compensation was of a peculiar nature. A grant of land and buildings was made with an exception of mines and coal and the right to work, the grantor paying treble damages for loss by working. "*Prima facie*," said Lord Campbell, C. J., "the owner of the surface is entitled to support from the subjacent *strata*; and if the owner of the minerals works them it is his duty to leave sufficient support for the surface in its natural state." The mere separation of the surface and the mines, and the giving of powers to work, were consistent with the exercise of the powers being subject to the implied right of the owner of the surface to support from the minerals; and the provision for compensation, notwithstanding its special form, did not alter this result. See, too, Proud v. Bates, 34 L. J. Ch. 406. Even when the minerals reserved are of such a nature that they cannot be got except by surface working—as freestone (Bell v. Wilson, 1 Ch. 393) or china clay (Hext v. Gill, 7 Ch. 699)—yet the mineral owner still requires specific power to interfere with the surface.

Where there is no evidence as to how the occupation of the surface and mines became separated, the conclusion is easy that the mine owner must leave sufficient support for the surface. The surface owner is entitled to support of common right and there is nothing to deprive him of the advantage. Humphries v. Brogden (1850), 12 Q. B. 739. What is the nature of the right to support, and how far it is correct to describe it as an easement, has been the subject of controversy. In Rowbotham v. Wilson, 8 H. L. C. 348, Lord Wensleydale suggested, in accordance with the view expressed in Bonomi v. Backhouse, E. B. & E. 622, p. 646, that it was not an easement, but the right of the surface owner to enjoy his own land in its natural state and condition, with a right of action against the mine owner when the latter did him an injury. But this applies only to the land without buildings. Where there are buildings existing when the severance of the surface and the minerals takes place, and when additional buildings are erected, the right of support is an easement which must be acquired by grant, express or implied, or under the Prescription Act, 1833 (Dalton v. Angus, 6 App. Cas. 740, per Lord Selborne, C., pp. 791, 792); though existing buildings will be impliedly included in the right of support for the surface. See Elliott v. North-Eastern Railway Co., 10 H. L. C. 333; Caledonian Railway Co. v. Sprot, 2 Macq. 449.

Where the separation takes place in the second o third of the modes above mentioned—that is, where it is the result of an inclosure award, or where the landowner has made a direct grant of the mines without the surface, the *prima facie* result is the same. In the case of an inclosure the mere reservation of mines to the lord of the manor, though expressed to be in as full a manner as he could have enjoyed the same if the inclosure had not been made, does not deprive the allottee of the surface of the right to support which he takes as surface owner (Love v. Bell, 9 App. Cas. 286); and though there is in the Inclosure Act a prohibition of working within a specified perpendicular distance beneath buildings on the surface, this does not authorize the mine owner to work beyond that distance if the effect is to injure the buildings. Haines v. Roberts (1857), 7 E. & B. 625. So, too, in the case where the landowner makes a direct grant of the minerals without the surface, there is no presumption that he gives up the right to support. The inference is that he makes the grant in such a manner as is consistent with the retention by himself of his own right of support. Dugdale v. Robertson, 3 K. & J. 695, p. 700. Thus, where the mines were granted with full power to work and win the same and to sink pits, compensating the grantor against loss due to these operations, it was held that the grantor as surface owner retained his common law right of support. Dixon v. White, 8 App. Cas. 833.

In the above cases the right of support was affirmed. It was the surface owner's *prima facie* right, and there was nothing in the origin of the severance of surface and minerals—whether it occurred by a reservation out of a grant, or under an Inclosure Act or award, or by direct grant of the mines without the surface—to deprive the surface owner of his *prima facie* right. But it is now settled that in all these cases such an effect may follow from the wording of the documents under which the titles of the respective parties are derived. At one time it was considered that a grantor of land with a reservation of the minerals could not take the reservation in such a form as to entitle him to let down the surface, at any rate, in the absence of provision for compensation. Hilton v. Lord Granville, 5 Q. B. 701. Such a

reservation, it was said, would be repugnant to the grant (p. 730). But this notion has been definitely abandoned, and it is now settled that in all cases the rights of the parties in this respect are governed by the terms of the title deeds. Examples of the grantor obtaining by the reservation a right to let down the surface are afforded by Buchanan v. Andrew, L. R. 2 H. L. Sc. 286, and Aspden v. Seddon, 10 Ch. 394. In the former case land was granted reserving the minerals, and there was a provision that the grantor should not be liable for any damage to the surface land or to buildings from working the minerals. It was held that this enabled the mine owner to let down the surface. In Aspden v. Seddon, the grant was for the purpose of erecting a cotton mill, and the grantor reserved the mines and powers of working, making compensation "for all damage that shall be done to the erections on the said plot by the exercise of any of the said excepted liberties or in consequence thereof," and it was considered that the express reference to damage to buildings showed that the mine owner was at liberty to let down the surface, though it was subsequently held that he was liable in damages for injury to the mill. Aspden v. Seddon, 1 Ex. D. 496.

The inclosure cases have afforded several examples of the loss by the surface owner of his *prima facie* right to support. The chief is Rowbotham v. Wilson, *supra*, where it was conclusively established that the rights of the parties depend upon the construction which is put upon the instrument of title. "It rarely happens," said Lord Wensleydale, "that these mutual rights are not precisely ascertained and settled by the deed by which the right to the mines is acquired, and then the only question would be as to the construction of that deed, which may vary in each case. There the award made under an Inclosure Act was executed by most of the parties interested. It expressly exempted the mine owner from damages through the surface lands being rendered uneven or otherwise defaced, and it was held that the effect was to give them a right to disturb the surface. In Duke of Buccleuch v. Wakefield, L. R. 4 H. L. 377, a special Inclosure Act reserved the mines to the lord of the manor, with powers of working which gave him very extensive control of the surface lands. Reasonable compensation was to be paid for damage done by the works. Here again it was held that the mine owner was at liberty to let down the surface. Other instances to the same effect will be found in Consett Waterworks Co. v. Ritson, 22 Q. B. D. 702, where there was no compensation clause, and Bell v. Earl of Dudley (1895), 1 Ch. 182, where compensation was given by a rate levied on all the allotments.

In the case of a lease of mines it has sometimes been thought that the lessee was in a more favourable position than an ordinary grantee (see *per* Jessel, M.R., in Aspden v. Seddon, 10 Ch. App. p. 399*n*) and that where the lease empowered him to remove the whole of the coal, he was not bound to leave pillars for the support of the surface, Eadon v. Jeffcock, L. R. 7 Ex. 379. But in Dugdale v. Robertson, 3 K. & J. 695, a demise of minerals was treated as being on the same footing as a reservation or as any other grant, so as to entitle the lessor to a *prima facie* right of support which could only be waived by a clear stipulation, and the law was settled in this sense by Davis v. Treharne, 6 App. Cas. 460. There a mining lease empowered the lessee to work the mines "in the usual and most approved way" in the district, and it was held that these words did not give the right to let down the surface, even though the working fell within them; nor did such a right follow from full liberties for the exercise of mining rights, with a compensation clause. The exercise of such rights might damage the surface otherwise than by subsidence, and the reasonable conclusion, said Lord Blackburn, was that the compensation was to be for things done in exercise of those rights. In the earlier case of Smith v. Darby, L. R. 7 Q. B. 716, it was held, upon the joint construction of the working powers and the compensation clause, that a power to let down the surface had been conferred, but this case is perhaps to be treated as exceptional, and the only safe course in settling a mining lease is to take express power to let down the surface if that is intended. "The state of the law," said Lord Halsbury, C., in New Sharleston Collieries Co. v. Earl of Westmoreland, *supra*, "is now perfectly clear. The mere fact of giving a right to sink pits and to work or get coal does not of itself establish a right to get rid of that which is the common law right of the surface owner to have his surface undisturbed." And he pointed out that in that case, which was a case of a mining lease, the absence of express permission to let down the surface was not without significance.

It appears from the above cases that the mere provision for compensation does not entitle the mine owner to let down the surface. Such provision has sometimes been said to be applicable only to damage occasioned in the course of the proper exercise of the liberties granted (see Harris v. Riding, *supra*; Davis v. Treharne, *supra*; Greenwell v. Low Beechburn Coal Co., 1897, 2 Q. B. 165), or to damage occasioned by accident or negligence. Dixon v. White, *supra*. While, of course, the absence of a compensation clause is strong evidence that the surface owner's right of support was not meant to be abandoned. Bell v. Earl of Dudley (1895), 1 Ch. 186. And even when the compensation clause appears to cover damage due to subsidence, it does not follow that such working is permitted. "A covenant to pay compensation," said Lord Davey in New Sharleston Collieries Co. v. Earl of Westmoreland, *supra*, "for doing a thing which you are prohibited from doing is in no way contrary to or inconsistent with the continuance of the obligation not to do it."—*Solicitor's Law Journal.*

## BOOKS RECEIVED.

Code Remedies: Remedies and Remedial Rights by the Civil Action According to the Reformed American Procedure. A Treatise Adapted to Use in All the States and Territories where that System Prevails. By John Norton Pomeroy, LL.D., Author of "A Treatise on Equity Jurisprudence," etc. Fourth Edition, Revised and Enlarged, by Thomas A. Bogle, Professor of Law in the University of Michigan. Boston, Little, Brown and Company, 1904. Sheep, pp. 1150. Price, $6.30. Review will follow.

Cyclopedia of Law and Procedure. William Mack, Editor-in-Chief. Volume XIII. New York. The American Law Book Company. London: Butterworth & Co., 12 Bell Yard. 1904. Review will follow.

The Interstate Commerce Act and Federal Anti-trust Laws, Including the Sherman Act; the Act Creating the Bureau of Corporations; the Elkins Act; the Act to Expedite Suits in the Federal Courts; Acts Relating to Telegraph, Military, and Post Roads; Acts Affecting Equipment of Cars and Lo-

comotives of Carriers Engaged in Interstate Commerce, with All Amendments. With Comments and Authorities, by William L. Snyder, of the New York Bar. New York: Baker, Voorhis & Company, 1904. Canvas. Price, $3.50. Review will follow.

## HUMOR OF THE LAW.

Between the devil and the deep sea was the white man who was arraigned before a colored justice for killing a man and stealing a mule. Said the justice: "I'se got two kinds of law in dis court—de Texas law and the Arkansas; now which will you hab?" Prisoner: "I believe I'll take the Arkansas." Judge: Well, den, I'll discharge you for stealin' de mule, and hang you for killin' de man." Prisoner: "I guess, Judge, I'll take the Texas." Judge: "Well, den, I'll discharge you for killin' de man, and hang you for stealn' de mule."

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An undoubted alibi was some time ago successfully proved in court as follows:

"And you say that you are innocent of stealing this rooster from Mr. Jones?" queried the judge.

"Yes, sir; I am innocent—innocent as a child."

"You are confident you did not steal the rooster from Mr. Jones?"

"Yes, sir; and I can prove it."

"How can you prove it?"

"I can prove that I didn't steal Mr. Jones' rooster, judge, because I stole two hens from Mr. Graston same night, and Jones lives five miles from Graston's."

"The proof is conclusive," said the court; "discharge the prisoner."

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Senator Evarts, even when he lived in Washington as President Hayes' Secretary of State, was notoriously unkempt with regard to his clothes, and looked like anything else than the nation's brilliant attorney. His hat, in particular, was a woeful bit of attire, and made him look like an actor "made-up" for Marks in "Uncle Tom's Cabin." Evarts, on one occasion registered in a Philadelpia hotel of the first-class about 8 o'clock in the evening, and immediately went out. Returning a few hours later, he stepped to the desk for his key, and found the night clerk had come on duty.

"Evarts—Mr. Evarts," said the Secretary of State, briskly, to the clerk.

The latter eyed the guest for a moment, evidently obtained an unfavorable impression, and replied:

"Mr. Evarts is very ill in his room, and has left positive orders that he will see nobody."

Mr. Evarts, wild with indignation, sought the manager and registered a complaint. The manager rushed to the desk and hotly demanded to know why Mr. Evarts had been reported as ill and in his room.

"Why, sir," responded the clerk, "I didn't like the looks of the fellow who called to see him, and didn't think a man of Mr. Evarts' importance would care to be bothered by a shabby old panhandler like that."

The explanation that soothed the Secretary of State was ingenious rather than truthful.

## WEEKLY DIGEST.

**Weekly Digest of ALL the Current Opinions of ALL the State and Territorial Courts of Last Resort, and of all the Federal Courts.**



1. ACCORD AND SATISFACTION—Part Payment.—The payment of a part of an indebtedness does not operate as an extinguishment of the entire indebtedness without a new and binding agreement.—Weinberg v. Novick, 88 N. Y. Supp. 168.

2. ADVERSE POSSESSION—Consistency with Legal Title.—The mere fact of 20 years' possession does not defeat the assertion of the paper title, but to accomplish such result the possession must be inconsistent with the rights of paper title holder.—Miller v. Warren, 87 N. Y. Supp. 1011.

3. ADVERSE POSSESSION—Land Dedicated for Streets and Alleys.—Title by prescription cannot be acquired by adverse possession of land dedicated to public for streets and alleys.—Hall v. Breyfogle, Ind., 70 N. E. Rep. 883.

4. ADVERSE POSSESSION—Prescription.—Defendants and their authors, having held possession of most of the tract in dispute under well marked and recognized boundaries for more than 40 years, are protected by the prescriptions of 10 and 30 years.—Levy v. Gause, La., 36 So. Rep. 684.

5. ADVERSE POSSESSION—Tacking.—Privity must be shown between adverse claimants of real estate before the possession of one can be tacked to the possession of the other to establish title by prescription.—Montague v. Marunda, Neb., 99 N. W. Rep. 653.

7. APPEAL AND ERROR—Amendment to Bill in Supreme Court.—An amendment to a bill in the supreme court, which will make a radically different case from that presented to the lower court, will not be permitted.—Levandowski v. Althouse, Mich., 90 N. W. Rep. 786.

8. APPEAL AND ERROR—Appealable Order.—An order denying a motion to vacate an order adding new parties defendant to an action is appealable.—Sundberg v. Goar, Minn., 99 N. W. Rep. 688.

9. APPEAL AND ERROR—Bill of Exceptions.—Statement in a bill of exceptions as to dates of trial controls, where there is a discrepancy between it and the record made by the clerk.—Avery v. Nordyke & Marmon Co., Ind., 70 N. E. Rep. 888.

10. APPEAL AND ERROR—Jurisdictional Question.—To give the supreme court jurisdiction of an appeal, the abstract must affirmatively show the entry of an appealable judgment.—Martin v. Martin, Iowa, 99 N. W. Rep. 719.

11. APPEAL AND ERROR—Practice Where Case is Reversed and Remanded.—The rule of this court is that, when a case is reversed and remanded generally, the district court is to exercise its discretion in the further proceedings in the cause, unless otherwise specially directed by this court.—Gadsden v. Thrush, Neb., 90 N. W. Rep. 835.

12. APPEARANCE—Nature of.—A party who has made a special appearance and moves for affirmative relief thereby makes a general appearance.—Montague v. Marunda, Neb., 99 N. W. Rep. 653.

13. ASSIGNMENTS — What Constitutes. — Where the owner of a claim for money assigns the same to another, who notifies the debtor, the assignment as a matter of form is complete, and the assignee becomes the owner of the claim.—Sintes v. Commerford, La., 36 So. Rep. 656.

14. ATTORNEY AND CLIENT — Determining Solicitor's Fee in Partition Suit.—In fixing the value of the services of complainant's solicitor in partition, the court has no right to refer that matter to members of the bar on the court's own motion.—McMullen v. Reynolds, Ill., 70 N. E. Rep. 1041.

15. BAILMENT — Bailee's Lien. — Manufacturers, to whom cut garments are delivered to be sewed, are entitled to hold possession of them until their claim for labor is paid, or until an offer is made to pay the same. —Davidson v. Fankuchen, 88 N. Y. Supp. 196.

16. BANKRUPTCY—Assignment of Account.—A creditor of a bankrupt cannot escape the consequences of an unlawful preference by assigning his account to a purchaser of the property of the bankrupt, under an agreement with such purchaser to assume the liability.—Hackney v. Hargreaves Bros., Neb., 99 N. W. Rep. 675.

17. BANKRUPTCY—Cancellation of Judgment.—Under Bankr. Act July 1, 1898, held, that a motion for the cancellation of a judgment against one discharged in bankruptcy should have been allowed.—Lent v. Farnsworth, 87 N. Y. Supp. 1112.

18. BANKS AND BANKING—Duty of Depositor to Examine Pass Book.—A depositor is not bound to examine his bank book to discover whether the officer receiving his deposit has blundered in counting the money deposited.—Kemble v. National Bank of Rondout, 88 N. Y. Supp. 246.

19. BANKRUPTCY — Effect of Discharge on Judgment for Torts.—Bankr. Act 1898, expressly provides that by his discharge a bankrupt shall not be released from a judgment for willful and malicious injuries to the property of another.—Stefanini v. Sroka, 88 N. Y. Supp. 167.

20. BANKRUPTCY—Fraudulent Conveyances —The execution of a mortgage on all of the mortgagor's property held not to constitute an act of bankruptcy where the reasonable value of the mortgagor's equity of redemption exceeded the amount of its unsecured debts. —Lansing Boiler & Engine Works v. Joseph T. Ryerson & Co., U. S. C. C. of App., Sixth Circuit, 128 Fed. Rep. 701.

21. BANKRUPTCY—Preference.—The title of a purchaser of bankrupt's property from a preferred creditor is not voidable, under Bankr. Act 1898, when purchase is in good faith, without notice, and for a valuable consideration.—Coolidge v. Ayers, Vt., 57 Atl. Rep. 970.

22. BILLS AND NOTES — Negotiability of Mortgage Note.—Where mortgage note provides that any taxes levied against the legal holder on account of the loan shall be paid by the party of the first part, the note is nonnegotiable.—Allen v. Dunn, Neb., 99 N. W. Rep. 680.

23. BILLS AND NOTES — Order of Indorsements.— When, in transferring an indorsed note of which his bank is payee, the president thereof puts his name above that of the indorser, his act gives rise to a strong implication that he did so because he knew the indorser was not a surety, but an indorser in the technical sense. —Redden v. Lambert, La., 36 So. Rep. 668.

24. BOUNDARIES — Acquiescence.—Where a practical location of boundaries has been acquiesced in for a number of years, it will not be disturbed.—People v. Hall, 88 N. Y. Supp. 276.

25. BROKERS—Commissions.—Real estate agent held not entitled to commission on the sale to a purchaser procured by him of property other than that originally contemplated.—Tooker v. Duckworth, Mo., 80 S. W. Rep. 976.

26. CANCELLATION OF INSTRUMENTS — Conveyance in Consideration of Support.—In a suit to set aside a deed, made in consideration of the grantor's future support, held that, as against an assault on the complaint made for the first time on appeal, an allegation of a demand for performance was unnecessary.—Tomlinson v. Tomlinson, Ind., 70 N. E. Rep. 881.

27. CARRIERS — Damages for Delay in Transporting Live Stock.—Where delay in transporting live stock is due to the carrier's negligence, held, it cannot limit its liability for damages to the extra cost of feeding and watering.—Botts v. Wabash R. Co., Mo., 80 S. W. Rep. 976.

28. CARRIERS — Conductor Insulting Passenger.—A street railway company is liable to a passenger for an injury to his feelings because of insulting language used by a conductor.—Gillespie v. Brooklyn Heights R. Co., N. Y., 70 N. E. Rep. 857.

29. CARRIERS — Injury to Alighting Passenger.—It is not negligence *per se* for a passenger to fail to take hold of the hand rail in alighting from a street car.—Crump v. Davis, Ind., 70 N. E. Rep. 886.

30. CARRIERS—Limiting Liability Affected by Special Consideration.—A provision in a bill of lading for the shipment of cattle, limiting the carrier's liability in case of delay to the amount paid by the shipper for feed and water, held unenforceable, in the absence of a special consideration.—Rice v. Wabash R. Co., Mo., 80 S. W. Rep. 974.

31. CARRIERS — Loss of Passenger's Baggage.—A passenger held bound by provisions set out in an excursion ticket limiting carrier's liability for loss of baggage.—Jacobs v. Central R. Co. of New Jersey, Pa., 57 Atl. Rep. 962.

32. CHATTEL MORTGAGES — Priorities.—A verbal chattel mortgage, not coupled with possession, will not take precedence over a subsequent written mortgage, taken without notice of the verbal mortgage.—Muller v. Parcel, Neb., 99 N. W. Rep. 684.

33. COLLEGES AND UNIVERSITIES— Construction of Will.—Establishment and maintenance of a clinic and a hospital for the sick, as directed by a will, held not *ultra vires* of Tulane University and of its board of administrators.—Succession of Hutchinson, La., 36 So. Rep. 639.

34. CONSTITUTIONAL LAW—Annexation of Territory.— In view of Const. 1890, § 88, Rev. Code 1892, § 2921, as amended by Acts 1898, p. 90, ch. 74, placing in the hands of the governor the power to pass on the right to incorporate cities and towns, held not repugnant to the constitution of the state, as a delegation of legislative power.—City of Jackson v. Whiting, Miss., 36 So. Rep. 611.

35. CONSTITUTIONAL LAW — Political Rights. — A civil right is a right accorded to every member of a district, community, or nation.—Winnett v. Adams, Neb., 99 N. W. Rep. 681.

36. CONTRACTS—Statute of Frauds.—Telegraphic correspondence, purporting to confirm oral agreement held not to constitute a written contract.—Brauer v. Oceanic Steam Nav. Co., N. Y., 70 N. E. Rep. 963.

37. CONVERSION — Equitable Conversion, When Effected.—The conversion of land into money is to be deemed as having been effected at the time of testator's death, although the sale of the land is to be postponed

until after the death of a life tenant.—Lash v. Lash, Ill., 70 N. E. Rep. 1049.

38. CORPORATIONS — Stockholder's Right to Attack Sale.—Stockholder's right to attack sale by a director of a corporation held secondary to that of the directors.—Polhemus v. Polhemus, 88 N. Y. Supp. 273.

39. CRIMINAL EVIDENCE—Confession.—Where a sheriff, without sufficient warning, directed accused to take off his shoe, and fitted it in certain tracks on the ground, such evidence was not inadmissible as being a confession.—Guerrero v. State, Tex., 80 S. W. Rep. 1001.

40. CRIMINAL EVIDENCE—Ignorance of Right to Have Certain Witness Testify.—Ignorance of the law as to his right to place a certain witness on the stand gives defendant no ground to complain of his conviction.—Lopez v. State, Tex., 80 S. W. Rep. 1016.

41. CRIMINAL EVIDENCE—Principals in Crime of Theft.—Defendant, not present at the time when money was obtained, held not a principal in the crime of theft.—Barnett v. State, Tex., 80 S. W. Rep. 1013.

42. CRIMINAL TRIAL—Discretion of Judge in Questioning Witness.—The discretion of the trial judge in questioning witnesses will not be interfered with, unless abused.—State v. Woods, La., 36 So. Rep 626.

43. CRIMINAL TRIAL—Newly Discovered Evidence.—One convicted of stealing is not entitled to a new trial on account of newly discovered evidence impeaching the credibility of the principal witness against him.—Jones v. State, Ark., 80 S. W. Rep. 1088.

44. CRIMINAL TRIAL—Remarks of Court to Jury.—Remarks of judge to jury in a criminal case, on being brought into court without having reached an agreement, held prejudicial error.—State v. Nelson, Mo., 80 S. W. Rep. 947.

45. DAMAGES — Admissibility of Mortality Tables.—Mortality tables held admissible in an action for personal injuries, though plaintiff was not insurable in some of the companies.—Southern Kansas Ry. Co. of Texas v. Sage, Tex., 80 S. W. Rep. 1038.

46. DAMAGES — Future Pain. — Where, in a personal injury case, there is evidence of a permanent injury and of present pain produced thereby, the injury may conclude that future pain will be suffered.—Jordan v. Cedar Rapids & M. C. Ry. Co., Iowa, 99 N. W. Rep. 693.

47. DAMAGES—Division of Damages and Costs.—Where the damages resulting from collision are divided, because both vessels were found in fault, the costs may properly be considered as a part of such damages, and also divided, unless in exceptional cases.—The Frank S. Hall, U. S. D. C., E. D. Pa., 128 Fed. Rep. 816.

48. DEATH—Admissibility of Carlisle Tables of Expectancy.—Carlisle tables held inadmissible, in an action for wrongful death, to show plaintiff's expectation of life.—Emery v. City of Philadelphia, Pa., 57 Atl. Rep. 977.

49. DEDICATION—Streets in Platted District.—Purchaser of lot in platted district acquired vested right not only in streets in front of his purchase, but in all streets of platted district.—Hall v. Breyfogle, Ind., 70 N. E. Rep. 883.

50. DEEDS—Rights of After-Born Children.—Children of grantor of a deed to a life tenant and then to children of the grantor held to include children born after the execution of the deed.—Russ v. Maxwell, 87 N. Y. Supp. 1077.

51. DEPOSITIONS—Limitation on Power of Courts.—A party has no right, and a court no power, to compel the production, either in court or before a magistrate, of the private papers of a witness which are not relevant and material to the case.—Dancel v. Goodyear Shoe Machinery Co., U. S. C. C., D. Mass., 128 Fed. Rep. 753.

52. DESCENT AND DISTRIBUTION—Enforcement of Legitime.—A third possessor, when sued by the forced heirs of a donor of property by act *inter vivos* to enforce heir *legitime* on the property itself, owes fruits or rents only from judicial demand.—Stockwell v. Perrin, La., 36 So. Rep. 635.

53. DESCENT AND DISTRIBUTION — Heirs Limited to Rights of Ancestor.—Heirs can take no greater right in land of the ancestor than he himself had. — Fields' Heirs v. Napier, Ky., 80 S. W. Rep. 1110.

54. DISMISSAL AND NONSUIT—Bill for Specific Performance.—Decree dismissing a bill for specific performance, relying on an oral contract, should be without prejudice to complainant's right to maintain a suit to enforce the contract.—Levandowski v. Althouse, Mich., 90 N. W. Rep. 786.

55. DOWER—Effect of Execution Sale.—Execution sale of land under a judgment in favor of the state does not extinguish the dower right of the wife of the judgment debtor.—Fields' Heirs v. Napier, Ky., 80 S. W. Rep. 1110.

56. DOWER—Widow's Share of Proceeds.—A widow is entitled to one-third of the gross proceeds of her husband's realty, free from deductions for taxes, repairs, etc., after the husband's death, and from expenses of sale.—Wild v. Toms, Iowa, 99 N. W. Rep. 709.

57. ELECTIONS—Mandamus to Register.—The register of voters held entitled to appeal suspensively from an order of the district court in mandamus proceedings.—State v. Durand, La., 36 So. Rep. 672.

58. ELECTRICITY—Breach of Contract to Furnish Sufficient Current.—The liability of one contracting to furnish electric current to operate a motor held measured by the warranted capacity of the motor.—Wofford & Rathbone v. Buchel Power & Irrigation Co., Tex., 80 S. W. Rep. 1078.

59. ELECTRICITY—Insufficient Insulation of Wires on Street.—In an action against an electric company for injuries to plaintiff by accidentally coming in contact with an electric cable, plaintiff held not a trespasser or licensee.—Commonwealth Electric Co. v. Melville, Ill., 70 N. E. Rep. 1052.

60. EMINENT DOMAIN — Condemnation Proceedings.—In condemnation proceedings, admission in rebuttal of master's certificate, showing what other land in vicinity sold for on foreclosure, held proper.—Brown v. Illinois, I. & M. Ry. Co., Ill., 70 N. E. Rep. 905.

61. EMINENT DOMAIN—Payment of Damages.—In an action to compel payment of damages for land taken 20 years previously under the power of eminent domain, burden of proof held to be on plaintiff to show that damages had not been paid.—Carter v. Bridge Turnpike Co., Pa., 57 Atl. Rep. 988.

62. EQUITY—Effect of Setting Down Pleas for Argument.—By setting down pleas for argument, a complainant admits the facts, but not the conclusions pleaded therein.—General Electric Co. v. New England Electric Mfg. Co., U. S. C. C. of App., Second Circuit, 128 Fed. Rep. 738.

63. ESTOPPEL—Res Judicata.—To constitue an estoppel, the issues in the prior suit must include the matters at issue in suit where the estoppel is pleaded.—Agnew v. Montgomery, Neb., 90 N. W. Rep. 820.

64. EQUITY—Political Rights.—Equity will not supervise the acts of a political party, for the protection of a political right.—Winnett v. Adams, Neb., 99 N. W. Rep. 681.

65. ESTOPPEL—After Acquired Title.—Where an article is sold with an express warranty of title by the seller, who at that time has no title, his subsequent acquirement of title inures to the benefit of the buyer by the estoppel.—Coolidge v. Ayers, Vt., 57 Atl. Rep. 970.

66. ESTOPPEL — Conducting Business in Another's Name.—Holder of saloon license held not estopped to deny liability for liquor furnished to persons conducting business in his name.—Walter Moise & Co. v. Krug, Neb., 90 N. W. Rep. 816.

67. ESTOPPEL—Failure of Depositor to Examine Pas Book.—A depositor cannot be held estopped by a failure to examine his passbook to see whether the amount deposited has been properly entered, unless the bank has been prejudiced by his neglect.—Kemble v. National Bank of Rondout, 88 N. Y. Supp. 246.

68. EVIDENCE—Declarations as Part of Res Gestae.—Declarations of donor of a certificate of deposit held admissible as part of the *res gestae*.—Johnson v. Cole, N. Y., 170 N. E. Rep. 873.

69. ESTOPPEL—Resulting Trusts.—Father, who furnished money to his son to purchase land, held estopped to question the validity of a sale by the son of mineral rights in the land, and of a mortgage executed by him. —Field's Heirs v. Napier, Ky. 80 S. W. Rep. 1110.

70. EVIDENCE—Infant's Admission Against Interest.—An infant cannot himself make, nor authorize any one for him to make, admissions against his interest.—Knights Templar & Masons' Life Indemity Co. v. Crayton, Ill., 70 N. E. Rep. 1066.

71. EVIDENCE—Books of Account.—In an action on an account, a book known as a "storage book," containing an entry of the transactions of a mill, held properly admitted in evidence.—Anderson v. Kannon, Neb., 90 N. W. Rep. 824.

72. EVIDENCE—Insanity.—Nonexpert evidence is not admissible as to the question of the sanity of a person, where the witnesses have not stated the facts on which their opinion is based.—Bothwell v. State, Neb., 99 N. W. Rep 669.

73. EVIDENCE—Proceedings of City Council.— Parol evidence of the proceeding of a city council required to be made matters of record is inadmissible to contradict the record.—Chippewa Bridge Co. v. City of Durand, Wis., 99 N. W. Rep. 603.

74. EVIDENCE—Prior Parol Agreements.—In an action on a written contract to secure an indebtedness, prior parol representations of plaintiff's agent, not incorporated in the contract, held inadmissible to vary its terms.—Singer Mfg. Co. v. Witt, Ky., 80 S. W. Rep. 1124.

75. EXECUTORS AND ADMINISTRATORS — Claim for Washing and Nursing.—In an action by a sister of a decedent against his administrator for washing done for deceased and for nursing him in his last illness, evidence that these services were performed is sufficient to justify a recovery.—Dance's Admr. v. Magruder, Ky., 80 S. W. Rep. 1120.

76. EXECUTORS AND ADMINISTRATORS—Effect of Will. —A testator may bind his devisees by designating a time for the settlement of the accounts of his executor greater than that specified in Ky. St. 1903, § 3847.—Lintheoum v. Vowel's Exr., Ky., 80 S. W. Rep. 1090.

77. EXECUTORS AND ADMINISTRATORS — Execution of Mandate of Supreme Court.—Under mandate of supreme court, moneys received by widow over what she was entitled to during settlement of estate should be treated as at interest against her. —Ludington v. Patton, Wis., 99 N. W. Rep. 614.

78. EXECUTION — Vested Remainder.—A vested remainder in real property held subject to execution against the remainderman during the life of the life tenant.—Roach v. Dance, Ky., 80 S. W. Rep. 1097.

79. FACTORS—Application of Proceeds.—Plaintiff held entitled to recover from defendant proceeds of the sale of rice belonging to plaintiff, which defendant paid over to third person, without authority from plaintiff and after being notified not to do so.—Post v. Houston Rice Milling Co., Tex., 80 S. W. Rep. 1025.

80. FRAUDS, STATUTE OF — Negotiating Loan. — A broker, authorized to secure a loan for the owner of real estate for the purpose of taking up a mortgage, held not entitled to raise the invalidity of an agreement for renewal entered into by the owner.—Mott v. Ferguson, Minn., 90 N. W. Rep. 804.

81. FRAUDULENT CONVEYANCES—Bankruptcy.—In order to establish a fraudulent preference by a bankrupt, it must be shown that the preferred creditor actually received as a result of the transfer a greater percentage on his debt out of that payable to the other creditors.—Engel v. Union Square Bank, 87 N. Y. Supp. 1070.

82. GUARDIAN AND WARD — Life Insurance. — Beneficiaries in a life policy held not estopped from claiming the face of the policy.—Knights Templar & Masons' Life Indemnity Co. v. Crayton, Ill., 70 N. E. Rep. 1066.

83. HOMESTEAD—Exemptions.—Housekeeper with a family resident of the state held entitled to homestead exemption in remainder of proceeds of sale of real estate purchased on credit after payment of lien for purchase price.—Torbitt & Castleman v. Jackson, Ky., 80 S. W. Rep. 1123.

84. HOMESTEAD — Incumbrance. — The acknowledgment by both husband and wife of an instrument, whereby it is sought to convey or incumber a homestead, is an essential step.—Solt v. Anderson, Neb., 99 N. W. Rep. 678.

85. HUSBAND AND WIFE — Community Property. — Where a deed was intended as a joint gift to a husband and wife, they were each invested with an undivided half of the land as their separate property.—King v. Summerville, Tex., 80 S. W. Rep. 1050.

86. HUSBAND AND WIFE—Homestead and Community Debts.—Where land was owned by a husband and wife in severalty, and was incumbered by improvements erected by community debts, the heirs of the husband are only entitled to homestead in his share of the land. —King v. Summerville, Tex., 80 S. W. Rep. 1050.

87. HUSBAND AND WIFE—Husband's Agency.—A husband, who is the agent of his wife, having full power to bind her in all matters, may pledge her securities for his own benefit.—Brosseau v. Lowy, Ill., 70 N. E. Rep. 901.

88. HUSBAND AND WIFE — Liability for Wife's Torts.—The common-law rule that a husband is liable jointly with his wife for torts committed by her in his presence, because of the marriage relation, does not exist in this state.—Goken v. Dallugge, Neb., 90 N. W. Rep. 818.

89. INDICTMENT AND INFORMATION—Misspelling Name of County.—Misspelling of name of county held not to vitiate an indictment.—Cabellero v. State, Tex., 80 S. W. Rep. 1014.

90. INFANTS—Guardian Ad Litem.—Duties of guardian *ad litem* do not terminate with judgment of trial court, but he may appeal, and his duties continue until final determination of cause.—Staggenborg v. Bailey, Ky., 80 S. W. Rep. 1109.

91. INFANTS — Restoration of Benefits Received Under Contract.—Where an infant seeks to avoid or rescind an executed contract of sale, he must first restore all that he has received on that account, if he still has it.—Zuck v. Turner Harness & Carriage Co., Mo., 80 S. W. Rep. 967.

92. INJUNCTION—Sale of Corporation Stock.—One who secures an injunction restraining the sale of property cannot defend an action on the injunction bond by urging that the plaintiff held title to the property in fraud of the creditors.—Slack v. Stephens, Colo., 76 Pac. Rep. 741.

93. INJUNCTION — Interference with Complainant's Business.—A complainant, furnishing trading stamps to merchants under contracts which prohibited their issuance except to customers under certain conditions, held entitled to an injunction to restrain reselling to other merchants stamps so purchased. — Sperry & Hutchinson Co. v. Mechanics' Clothing Co., U. S. D. C., D. R. I., 128 Fed. Rep. 800.

94. INTERNAL REVENUE—Legacy Tax.—A legacy to a son-in-law of the testator is subject to tax under War Revenue Act June 13, 1898, ch. 448, § 29, cl. 5, 30 Stat. 464 [U. S. Comp. St. 1901, p. 2308], as one to a stranger in blood. —King v. Eldman, U. S. C. C., S. D. N. Y., 128 Fed. Rep. 815.

95. JUDGMENT—Want of Necessary Parties.—The want of necessary parties does not deprive the court of jurisdiction; but the decree binds the parties to it till set aside in a direct proceeding.—Tod v. Crisman, Iowa, 99 N. W. Rep. 686.

96. JUSTICES OF THE PEACE—Appearance a Waiver of Irregular Citation.—One irregularly cited to appear before a justice in a proceeding brought to revive a dor-

mant judgment held to have waived the irregularity by his appearance.—Keeley Institute of Kansas v Rigg, Neb., 90 N. W. Rep. 883.

97. LANDLORD AND TENANT—Implied Agreement.—When a tenant holds over after the expiration of his term, an agreement for a year on the terms of the prior lease is implied.—Flomerfelt v. Dillon, 88 N. Y. Supp. 132.

98. LANDLORD AND TENANT—Implied Covenants.—A covenant on the part of a tenant that he would not use the premises, except for a lyceum or dancing hall, cannot be extended into an implied covenant on the part of the landlord that the premises were or should continue to be fit for such a purpose.—Lyons v. Gavin, 88 N. Y. Supp. 252.

99. LANDLORD AND TENANT—Repairing Fences.—A landlord is not liable to a tenant for rebuilding and repairing a fence, the necessity for which was caused by rains during the tenancy, where there was no agreement to pay therefor.—Jones v. Felker, Ark., 80 S. W. Rep. 1088.

100. LANDLORD AND TENANT—Termination of Tenancy.—Where a letting is by the month, to continue for an indefinite period, it can be terminated only at the end of the monthly period by giving one week's notice prescribed by Code 1892, § 2544.—Wilson v. Wood, Miss., 36 So. Rep. 609.

101. LIBEL AND SLANDER—Implied Malice.—The law implies malice from false statements of dishonorable or disgraceful matters as facts, which are given publicity through a newspaper.—Mertens v. Bee Pub. Co., Neb., 90 N. W Rep. 847.

102. LIFE ESTATE—Waste to the Inheritance.—A statute giving to remaindermen a right of action for any damages for waste to the inheritance does not take from the life tenant the right to recover therefor.—Dix v. Jaquay, 88 N. Y. Supp. 228.

103. LIMITATION OF ACTIONS—Lex Loci.—Where a statute gives a new right of action, and fixes the time within which it may be enforced, the time so fixed will control, no matter in what forum the action is brought.—Negaubauer v. Great Northern Ry. Co., Minn., 99 N. W. Rep. 620.

104. MARRIAGE—Meretricious Commencement of Relation.—Where a man and woman commenced to cohabit at a time when the woman was the wife of another, subsequently holding themselves out as husband and wife held not sufficient to establish a common-law marriage.—Edelstein v. Brown, Tex. 80 S. W. Rep. 1027.

105. MALICIOUS PROSECUTION—Probable Cause.—In malicious prosecution, it is enough to excuse the prosecutor, for if he exercised such a degree of impartiality as can be fairly expected from an ordinarily prudent man acting without malice.—Shafer v. Hertzig, Minn., 90 N. W. Rep. 796.

106. MANDAMUS—When Issued.—A peremptory writ of mandamus will not be issued, except with a view to enforce its mandates, if necessary.—State v. Moores, Neb., 90 N. W. Rep. 842.

107. MASTER AND SERVANT—Assumed Risk.—Ship carpenters held to have assumed the risk of dismantling a wheel without removing pitmans.—Herbert v. Wiggins Ferry Co., Mo., 80 S. W. Rep. 978.

108. MASTER AND SERVANT—Assumption of Risk.—In order to create a contract for assumption of risk, it is necessary that servant both knew and appreciated the danger.—Avery v. Nordyke & Marmon Co., Ind., 70 N. E. Rep. 888.

109. MASTER AND SERVANT—Automobile Accident.—Where, in action for injuries by an automobile, there was evidence that the machine was under defendant's control at the time, the negligence of the operater was imputable to defendants.—Parker v. Homan, 88 N. Y. Supp. 137.

110. MASTER AND SERVANT—Bursting of Steam Reservoir.—An employee, when killed by the unjointing of a steam reservoir, held not a mere volunteer, though he was not engaged in his regular employment.—Krueger v. Bartholomay Brewing Co., 87 N. Y. Supp. 1054.

111. MASTER AND SERVANT—Concurring Negligence of Fellow Servant.—The negligence of a fellow servant, concurring with the negligence of a vice principal, does not relieve the master from liability.—Tex. Cent. R. Co. v. Pelfrey, Tex., 80 S. W. Rep. 1036.

112. MASTER AND SERVANT—Employee Injured on Hand Car.—Where servants of a railroad company are accustomed to ride to and from their work on a hand car, it is the duty of the railroad to furnish a safe track their use.—Texas & N. O. R. Co. v. Kelly, Tex., 80 S. W. Rep. 1073.

113. MASTER AND SERVANT—Injury to Foreman of Bridge Gang.—Foreman of a bridge gang employed by a railroad held entitled to recover, though injured through the negligence of those in his charge, concurring with that of defendant.—Texas & N. O. R. Co. v. Kelly, Tex., 80 S. W. Rep. 1073.

114. MASTER AND SERVANT—Knowledge of Danger.—A servant, who may be presumed to know the ordinary hazzards attending a certain business, is not entitled to the same or similar notice of dangers incident to the employment as if he were ignorant or inexperienced.—Weed v. Chicago, St. P., M. & O. Ry. Co., Neb., 90 N. W. Rep. 827.

115. MASTER AND SERVANT—Master's Duty of Inspection.—An employee held not charged with any duty of inspection, or with negligence in failing to discover dry rot timber which broke.—Meehan v. Atlas Safe Moving & Machinery Truckage Co., 87 N. Y. Supp. 1031.

116. MASTER AND SERVANT—Negligence of Superintendent.—The giving of a proper command by a superior servant does not in every instance impose on him the duty of protecting the servant commanded while executing the order.—Muncie Pulp Co. v. Davis, Ind., 70 N. E. Rep. 875.

117. MASTER AND SERVANT—Risk Vountarily Assumed by Servant.—Master held not liable for death of servant, killed while voluntarily undertaking to help in a work of manifest danger.—Durst v. Bromley Bros. Carpet Co., Pa., 57 Atl. Rep. 986.

118. MORTGAGES—Extent of Covering.—A mortgage duly executed, purporting to convey a full section of land, transfers a fraction thereof owned by the grantor.—Risch v. Jensen, Minn., 99 N. W. Rep. 628.

119. MORTGAGES—Rights of Mortgagee in Possession.—Mortgages on a leasehold can have no durationbeyond the term of the lease, and mortgagees in possession thereunder can accquire no greater rights by virtue of their possession than the lessees.—Miller v. Warren, 87 N. Y. Supp. 1011.

120. MORTGAGES—Surplus Fund Remaining after Foreclosure.—On mortgage foreclosure and sale, if a surplus remains, the court has full power to bring in all necessary parties and terminate the ownership of the fund.—Montague v. Marunda, Neb , 99 N. W. Rep. 653.

121. MECHANICS' LIENS—Duration of Liens.—No lien for materials can endure longer than six months after the last materials were furnished to the property, unless a claim be filed within the six months.—W. T. Bradley Co. v. Gaghan, Pa., 57 Atl. Rep. 985.

122. MUNICIPAL CORPORATION—Abandonment of Sewers.—Where a city makes provisions by sewers for carrying off surface water, it may not abandon the same when it leaves the lot owner in a worse condition than if the city had not constructed the same.—McAdams v. City of McCook, Neb., 99 N. W. Rep. 656.

123. MUNICIPAL CORPORATIONS—Contract as to Future Years.—Provision, in a city's contract with a water company for a supply of water for 30 years, that its license tax shall not be increased in that time, held *ultra vires*.—City of Birmingham v. Birmingham Waterworks Co., Ala., 36 So. Rep. 614.

124. MUNICIPAL CORPORATIONS—Electric Wires in Highway.—Person killed by the negligence of a city

leaving a heavily charged and exposed electric wire on the highway, held not guilty of contributory negligence. —Emery v. City of Philadelphia, Pa., 57 Atl. Rep. 977.

125. MUNICIPAL CORPORATIONS—Franchise for Subways.—Franchise for for use of space for subways and other structures beneath streets construed, and rights acquired thereunder determined.—Western Union Tel. Co. v. Electric Light & Power Co. of Syracuse, N. Y., 70 N. E. Rep. 866.

126. MUNICIPAL CORPORATIONS—Letting of Contracts.—In considering bids for public work, only such as are made in compliance with the charter provisions should be recognized by the council.—Chippewa Bridge Co. v. City of Durand, Wis., 99 N. W. Rep. 603.

127. MUNICIPAL CORPORATIONS — Liability of Person Placing Obstructions in Street.—The building of an obstruction across a street in violation of law subjects the one building it to liability to a person injured, notwithstanding the fact that there is no defect in its construction.—Shippers' Compress & Warehouse Co. v. Davidson, Tex., 80 S. W. Rep. 1032.

128. MUNICIPAL CORPORATIONS—Obstruction in Street. —A material obstruction to a public street is *perse* a public nuisance, and, as against the author, may be abated at any time.—Hall v. Breyfogle, Ind., 70 N. E. Rep. 883.

129. MUNICIPAL CORPORATIONS—Reduction of Official's Salary.—Municipal employee who without protest accepted reduced salary after first year, could not be heard to claim compensation as fixed for first year. —Grieb v. City of Syracuse, 87 N. Y. Supp. 1088.

130. MUNICIPAL CORPORATIONS—Street Improvement an "Original Construction"—A street improvement held an original construction within the statute making an original construction a liability against the abutting property.—Adams v. City of Ashland, Ky., 80 S. W. Rep. 1105.

131. NEGLIGENCE—Dangerous Sidewalks.—An owner of a lot, constructing a sidewalk connecting a dwelling on his premises with the street, is required to exercise ordinary care to keep it in good condition.—Marsh v. Minneapolis Brewing Co., Minn., 99 N. W. Rep. 630.

132. NEGLIGENCE—Friendly Scuffle.—Where two persons voluntarily and mutually engage in a friendly scuffle, and one of them by mere accident injures the other, no action for the injuries received will lie.—Gibeline v. Smith, Mo., 80 S. W. Rep. 961.

133. NEGLIGENCE — What Constitutes.—A definition of negligence held not objectionable for failure to limit it to such care as persons of ordinary prudence "usually" exercise under like or similar circumstances.—Kentucky & I. Bridge & R. Co. v. Shrader, Ky., 80 S. W. Rep. 1094.

134. NEW TRIAL — Failure to Obtain Transcript.—Where a party has, without fault or neglect on his part, or his attorneys, failed to obtain a transcript for a review on error in this court, a new trial will be granted, if necessary to secure him this constitutional right. —Zweibel v. Caldwell, Neb., 99 N. W. Rep. 843.

135. PARENT AND CHILD — Stepfather's Right to Son's Services.—Stepfather, who assumed the relation of a father to a stepson, and not the boy's mother, held entitled to the proceeds of his labor, and to sue for loss of his services.—Eickhoff v. Sedalia, W. & S. R. Co., Mo., 80 S. W. Rep. 966.

136. PARTITION—Authority to Sue.—Where a guardian was not authorized to sue for partition, but the property was sold, any irregularity arising from failure to obtain authorization to bring a partition suit may be cured, and the sale ratified, by calling a family meeting for that purpose, under Civ. Code, art. 1788.—MacRae v. Smith, La., 36 So. Rep. 659.

137. PARTITION—Formalities.—Where the interest of a minor is involved in property sold at partition sale, the adjudicatee of the property has the right to require that every formality be complied with, or be completely ratified.—MacRea v. Smith, La., 36 So. Rep. 659.

138. PARTNERSHIP—Employee Sharing Profits as Compensation.—A mere employee, engaged to render service in conducting a business, although he is to receive a share of the profits as compensation for his services, is in no sense a partner.—Gentry v. Singleton, U. S. C. C. of App., Eighth Circuit, 128 Fed. Rep. 679.

139. PARTNERSHIP—Sharing Profits.—A person who is to be paid for his services a share of the profits realized by another in a venture in which the services are to be rendered is not the latter's partner.—Smythe's Estate v. Evans, Ill., 70 N. E. Rep. 906.

140. PAYMENT — Overpayment on Note.—In action for amounts overpaid on a note, introduction of the note and a slip which had been attached to it, bearing indorsements, held not to make out a *prima facie* case.—Gibbs v. Farmers' & Merchants' State Bank, Iowa, 99 N. W. Rep. 703.

141. PAYMENT—Postdated Check.—A plea of payment by a postdated check which has been returned is unavailable.—Lockwood Trade Journal v. New York Silicate Book & Slate Co., 88 N. Y. Supp. 152.

142. PROCESS — What Constitutes Abuse of Process.— Intentional wrongdoing or wanton attempt to pervert the processes of the law held necessary to constitute abuse of process.— Petry v. Charles H. Childs & Co., 88 N. Y. Supp. 286.

143. PERPETUITIES—Power in Trust.—A devise of an estate to a person who shall be known as treasurer of an unincorporated ecclesiastical body, in trust, to apply to the use of such body, held invalid as unlawfully suspending the power of alienation of real estate.—Murray v. Miller, N. Y., 70 N. E. Rep. 870.

144. RAILROADS — Crossing Injuries. — A reasonably prudent person should, on approaching a crossing, guard against approach of a train at an excessive speed; there being no ordinance or law restricting the rate of speed.—Green v. Los Angeles Terminal Ry. Co., Cal., 76 Pac. Rep. 719.

145. RAILROADS—Death by Wrongful Act.—In an action against a railroad for the death of a person who drove on the track, deceased held guilty of contributory negligence, precluding a recovery.—Union Pac. R. Co. v. Smith, Neb., 90 N. W. Rep. 813.

146. RAILROADS—Death of Trespasser.—In an action against a railroad company for wrongfully causing the death of a trespasser, the fact that defendant did not own its right of way did not affect intestate's *status* as a trespasser.—Dorsey's Admx. v. Louisville & N. R. Co., Ky., 80 S. W. Rep. 1131.

147. RAILROADS—Injury to Employee of Other Railroad.—Railroad company held not responsible to the employees of another company for the faulty operation of a switching engine.—Ederle v. Vicksburg, S. & P. R. Co., La., 36 So. Rep. 664.

148. SALES — Breach of Warranty. — Where the purchaser of a stallion rescinded for breach of warranty, he could not recover for the keep of the stallion and expense of returning him any greater sum than claimed in the petition.—Berkey v. E. Lefebure & Sons, Iowa, 99 N. W. Rep. 710.

149. SALES—Breach of Warranty.—On a breach of the warranty of quality on the sale of a machine, the purchaser must offer to return the property within a reasonable time after discovering the breach, and, if he fails to do so, the sale becomes absolute —Nichols & Shepard Co. v. Caldwell, Ky., 80 S. W. Rep. 1099.

150. SALES—Evidence of Ownership.—Mere possession of personal property by the seller, if there be no other evidence of ownership or power of disposal, will not preclude a third person, who is the true owner, from reclaiming his property or its value from the purchaser. —Gentry v. Singleton, U. S. C. C. of App., Eighth Circuit, 128 Fed. Rep. 679.

151. SALES—Notice of Rescission.—Where, on the sale of personal property with warranties, the remedy by rescission is given on the failure of such warranties and notice to the vendor, the notice provided for is an essen-

tial prerequisite.—Larson v. Minneapolis Threshing Machine Co., Minn., 99 N. W. Rep. 628.

152. SHIPPING—Defective Cable.—The pulling out of a splice in a cable used in discharging a ship, whereby a laborer was injured, held not to create a presumption of negligence on the part of the ship.—The Tresco, U. S. D. C., E. D. Pa., 128 Fed. Rep. 780.

153. SHIPPING — Seaworthiness.—A vessel cannot be said to be seaworthy for a voyage, where at its inception she has little, if any, metacentric height, and a list of eight or nine degrees, and her cargo weight is so distributed that her instability must increase as she proceeds from the consumption of coal and water —The Oneida, U. S. S. C. of App., Second Circuit, 128 Fed. Rep. 687.

154. STATES—Judicial Establishment of Boundaries.—State boundary line held capable of being established by prescription, though variant from the original grant, if the political power of states involved is not affected thereby.—Town of Searsburg v. Town of Woodford, Vt., 57 Atl. Rep. 961.

155. STREET RAILROADS—Frightening Horses.—In an action for injuries occasioned by a horse frightening at a street car, held proper to show that the street was much traveled by the public.—Denison & S. Ry. Co. v. Powell, Tex., 80 S. W. Rep. 1054.

156. STREET RAILROADS—Grant of Right in Street.—In estimating the number of lineal feet of property necessary to authorize the consent of a municipality to the construction of a street railway, cross streets are to be omitted.—People's Traction Co. v. Atlantic City, N. J., 57 Atl. Rep. 972.

157. TAXATION—Corporations.—Corporation held not entitled to deduction from its assessment on account of liability to return par value of stock to preferred stockholders.—People v. Miller, 88 N. Y. Supp. 197.

158. TAXATION—Suit to Set Aside Tax Deeds.—In suit to set aside tax deed as cloud on title, held unnecessary to refer cause to master for purpose of ascertaining amount due as redemption money.—Glos v. Gleason, Ill., 70 N. E. Rep. 1045.

159. TELEGRAPH AND TELEPHONES — Forfeiture of Grant.—Forfeiture of franchises and easements of a telephone company in the streets of a city can be declared and enforced only by a court of competent jurisdiction.—Nebraska Telephone Co. v. City of Fremont, Neb., 99 N. W. Rep. 811.

160. TRIAL—Jury Question.—A party is entitled to have the whole case submitted to the jury, either for a general verdict or for such special findings as will be determinative of the case.—Coolidge v. Ayers, Vt., 57 Atl. Rep. 970.

161. TRIAL—Direction of Verdict.—When the evidence so conclusively entitles one party to a verdict that a verdict for his opponent would have to be set aside, the court may properly direct a verdict in his favor.—Gentry v. Singleton, U. S. C. C. of App., Eighth Circuit, 128 Fed. Rep. 679.

162. TRIAL—Instruction Being Against Weight of Evidence.—In action for breach of contract to furnish sufficient electric current to operate a motor, an instruction held erroneous as being on the weight of evidence.—Wofford & Rathbone v. Buchel Power & Irrigating Co., Tex., 80 S. W. Rep. 1078.

163. TRIAL—Refreshing Jury's Memory —Trial judge should not give undue prominence, or refresh the jury's memory, as to the evidence on one side of the controversy, without doing so as to the other.—Coman v. Wunderlich, Wis., 99 N. W. Rep. 612.

164. VENDOR AND PURCHASER—Specific Performance. —Where defendant contracted to convey his interest in the premises, a subsequent covenant to deliver warranty deed could not be construed to enlarge agreement so as to require conveyance of fee —Henderson v. Beatty, Iowa, 99 N. W. Rep. 716.

165. VENDOR AND PURCHASER—Speculative Contract.—Where, at the time of the making of a contract for the sale of land, the vendor had no title thereto, and was thereafter not able to perform it, the vendee was entitled to recover, not only the amount paid, but damages for the loss of his bargain.—Arentsen v. Moreland, Wis., 99 N. W. Rep. 790.

166. VENDOR AND PURCHASER—Statute of Frauds.—Notice, actual or constructive, of a contract for the sale of land, void under the statute of frauds, does not prevent the person having such notice from purchasing the property from the original owner —Koenig v. Dohm, Ill., 70 N. E. Rep. 1061.

167. VENDOR AND PURCHASER—When Title Passes to Land.—Where a vendor is in actual possession of land, and sells the same by notarial act, possession is vested in the vendee by virtue of the conveyance, and no physical act in taking possession is necessary.—Levy v. Gause, La., 36 So. Rep. 684.

168. WATERS AND WATER COURSES — Appropriation for Irrigation.—One who diverts water from a flowing stream for a beneficial purpose may have the use of it so long as he conforms to the law regulating such matters; but he has no contract with or grant from the government, federal or state, in respect to his privilege.—Mohl v. Lamar Canal Co., U. S. C. C., D. Colo., 128 Fed. Rep. 776.

169. WILLS—Construing the Words "His Lawful Heirs." —Under bequest of residuary estate to "his lawful heirs," held, that all persons who at the time of testator's death were his lawful heirs were entitled to share in his residuary estate, regardless of their relationship to the testator.—Mooney v. Purpus, Ohio, 70 N. E. Rep. 894.

170. WILLS—Interest of Remainderman.—Life tenant under will, who temporarily waived her rights, held not entitled to an equitable lien enabling her to reach interest of remainderman.—Hare v. Congregational Soc. of Ferrisburg, Vt., 57 Atl. Rep. 964.

171. WILLS—Parol Agreement to Devise Land.—A suit to enforce specific performance of a parol agreement to devise real property and to quiet title held not a collateral attack on the judgment admitting will to probate.—Best v. Gralapp, Neb., 99 N. W. Rep. 837.

172 WILLS—Worthless Notes as an Advancement.—Where testator delivered certain worthless notes to a beneficiary as an advancement, she was entitled to return them to the estate as *pro rata* satisfaction of the advancement.—Nay v. Wright's Exrs., Ky., 80 S. W. Rep. 1120.

173. WITNESSES—Confidential Communications —An attorney held exempt from testifying as to whom he represented in a certain purchase; this involving the disclosure of confidential communications. — *In re* Shawmut Min. Co., 87 N. Y. Supp. 1059.

174. WITNESSES—Examination as to Credibility.—To test credibility, a witness may on cross-examination be asked whether he has ever been an inmate of an insane asylum.—Hendricks v. Mechanics' Bank, 88 N. Y. Supp. 176.

175. WITNESSES—Leading Questions.—If it reasonably appears that a witness is attepting to shield or favor defendant, it is not error to permit plaintiff to ask leading questions, though the witness states that he is friendly to plaintiff.—Missouri, K. & T. Ry. Co. of Texas v. McAnaney, Tex., 80 S. W. Rep. 1062.

176. WITNESSES—Right of Appeal in Matters of Fees.—Under Laws 1901, p. 28, ch. 31, and Ballinger's Ann. Codes & St. §§ 4794, 5185, held, that witnesses in a criminal case had no right to appeal to the supreme court from an order of the trial court disallowing their fees for attendance and mileage as certified by the clerk.—State v. Fair, Wash., 76 Pac. Rep. 731.

177. WITNESSES—Where Testimony is a Surprise.—Where the state introduced a witness, without having first consulted with him, to prove a certain fact which the witness denied, the state held not entitled to contradict him on the ground of surprise.—Dunk v. State Miss., 36 So. Rep. 609.